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No. _____

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In The

Supreme Court of the United States

October Term, 1986

L. BROOKS PATTERSON, RICHARD THOMPSON, DAVID CASE, individually and in their capacities as Oakland County Prosecutors; JAMES A'HEARN and ROBERT LEON, individually and in their capacities as members of the Oakland County Prosecutor Office Investigation Division and/or the Oakland County Organized Crime Strike Force; Jointly and Severally,

Petitioners,

v.

LAWRENCE E. JOSEPH and R. FRANK JOSEPH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

– AND APPENDIX –

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QUESTIONS PRESENTED

I.

WHETHER A WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE ISSUES RESERVED IN *IMBLER* v *PACHTMAN* CONCERNING THE SCOPE OF ABSOLUTE IMMUNITY AVAILABLE TO STATE PROSECUTORS?

II.

WHETHER THE SIXTH CIRCUIT COURT OF APPEALS IMPROPERLY DENIED ABSOLUTE IMMUNITY TO A MEMBER OF THE CONCEALED WEAPONS LICENSING BOARD BECAUSE THE SIXTH CIRCUIT BASED ITS DECISION UPON MISTAKES OF FACT AND LAW?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 795 F2d 549 (6th Cir 1986). A copy of this opinion is attached as Appendix "A" to this petition.

The opinion of the United States District Court, Eastern District of Michigan, Southern Division was rendered from the bench and is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 2, 1986. *See Joseph* v *Patterson*, 795 F2d 549 (6th Cir 1986).

Petitioners' timely motion for rehearing and suggestion for rehearing *en banc* was denied on August 19, 1986. *See* Appendix "B".

Petitioners' motion for stay of the issuance of the mandate, pending the filing and disposition of this petition for writ of certiorari, was granted on September 8, 1986.

This petition for a writ of certiorari has been filed within the allowable ninety day period and this Court's jurisdiction is invoked under 28 USC § 1254(1).

STATUTORY PROVISIONS

42 USC § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

I.

COURSE OF PROCEEDINGS

Respondents instituted the present action in 1982, alleging violations of 42 USC §§ 1983, 1985 and 1986 as well as various pendent state claims including intentional infliction of mental distress, malicious prosecution, false arrest and illegal search and seizure. The basis for jurisdiction was pursuant to 28 USC § 1331. The named defendants included the Oakland County Prosecuting Attorney, L. Brooks Patterson, his Chief Assistant, Richard Thompson, Assistant Prosecuting Attorney, David Case, as well as investigators James A'Hearn and Robert Leon of the Prosecuting Attorney's Investigation Division. In addition, the City of Birmingham, its City Manager, Chief of Police, Commissioner and one of its police officers were named as defendants.[1]

By way of affirmative defenses, the named defendants from the Oakland County Prosecutor's Office asserted the defenses of both absolute immunity and qualified immunity or good faith. The defense of absolute or quasi-judicial immunity was ultimately raised in a motion to dismiss, pursuant to Fed. R. Civ. Pro. 12(b)(6) which was heard and granted on February 2, 1984.

At the time the petitioners' motion was granted, District Judge Horace W. Gilmore rendered a lengthy oral opinion from the bench, relying principally on the United States Supreme Court's decision in *Imbler* v *Pachtman*, 424 US 409, 96 S Ct 984, 47 L Ed 2d 128 (1976). Respondents subsequently moved for reconsider-

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[1] The City of Birmingham, its officials and employees reached a settlement agreement with respondents shortly before the date set for trial.

ation of Judge Gilmore's ruling and the motion for reconsideration was denied on April 11, 1984.

Respondents appealed to the United States Court of Appeals for the Sixth Circuit; oral argument was held on January 16, 1986 and the Sixth Circuit rendered its opinion reversing and remanding in part and affirming in part on July 2, 1986. Petitioners' timely motion for rehearing was denied on August 19, 1986.

II.

STATEMENT OF FACTS

The issues raised by petitioners arise from a criminal prosecution of respondents and certain administrative proceedings involving Respondent Lawrence Joseph.

As a result of an incident which occurred in the early morning hours of March 14, 1980, respondents' younger brother, George Joseph, was taken into custody for felonious assault by the Birmingham Police Department.

Hal Morrow, who was the individual threatened by respondents' younger brother, was contacted about two hours after George Joseph's arrest, by an individual named Judy Palmer and Respondent Lawrence Joseph. Morrow was offered $200.00 by Palmer and was told by respondent that he would do anything it would take to make Morrow happy. Morrow tape recorded these calls at the request of Birmingham Police Officer Schultz.

Pursuant to Respondent Lawrence Joseph's suggestion, Morrow met him at Joseph's business, the Market Square grocery store. Morrow was told to "play along" by Birmingham Police Officer Schultz.

At Market Square, Lawrence Joseph asked Morrow what it would take to get this matter with his younger brother settled. When Morrow suggested $1,000.00,

Lawrence Joseph pulled out $800.00 and indicated that Morrow would have to sign a "receipt" and call the Birmingham Police to drop the criminal charges before receiving the money. Respondent Frank Joseph was present during this entire transaction and dialed the phone for Morrow; the call was placed to the Birmingham Police at 8:45 a.m.

Within approximately one hour, Officer Schultz contacted Petitioner A'Hearn, an investigator with the Prosecuting Attorney's Criminal Investigation Division, and requested the assistance of the Prosecutor's Office concerning possible charges against the Josephs. A'Hearn contacted Chief Assistant Thompson who determined that it would be necessary to interview Morrow.

After Morrow was interviewed by Thompson, the decision was made to seek issuance of criminal complaints for conspiracy to obstruct justice and conspiracy to compound a felony, arrest warrants and a search warrant to recover the "receipt" from Market Square. The affidavit in support of the search warrant was executed by Birmingham Police Officer Schultz.

The criminal complaints, arrest warrants and search warrant were presented to, and issued by, a state judge at one hearing conducted in the mid-afternoon of March 14, 1980. The search warrant was executed in the late afternoon of the same day.

The charges against respondents were dismissed by a state judge following a preliminary hearing; his decision was upheld by the Oakland County Circuit Court and the Michigan Court of Appeals denied leave to appeal.

The second aspect of this case pertinent to the instant application for writ of certiorari is the administrative proceeding before the Oakland County Concealed Weapons Licensing Board (hereinafter "C.W.L.B."). In July,

1982, Respondent Lawrence Joseph's unrestricted concealed weapons permit was scheduled to expire. Lawrence Joseph had held an unrestricted or general concealed weapons permit since 1979 and had held a restricted license prior to that time. On August 3, 1982, a hearing was conducted to consider his application for renewal and Lawrence Joseph's license was reduced from a general to a restricted license (business purposes only).

On September 13, 1982, plaintiff filed a complaint for declaratory and injunctive relief seeking relief pursuant to the Michigan Administrative Procedures Act. *See*, Appendix "C". The state court ordered on September 22, 1982 that a second hearing be conducted. On October 13, 1982, a hearing by the C.W.L.B. was conducted at which time a court reporter was present. Lawrence Joseph was represented by counsel and presented sworn testimony. The C.W.L.B. again decided that respondent's general permit should be reduced to a restricted permit. Respondent filed a petition for judicial review under the Michigan Administrative Procedures Act on or about December 12, 1982. *See*, Appendix "C". Counsel for the C.W.L.B. also acknowledged the applicability of the Administrative Procedures Act. *See*, Appendix "C".

The state court reviewed the agency proceedings, appointed a mediator to consider the case and accepted legal briefs from the parties.

On March 7, 1984, the state court vacated the C.W.L.B.'s decision to reduce Lawrence Joseph's weapon permit to a restricted license.

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT CONCERNING THE AVAILABILITY OF ABSOLUTE IMMUNITY TO STATE PROSECUTORS WHO INTERVIEW COMPLAINING WITNESSES AND PREPARE SEARCH WARRANT APPLICATIONS IMMEDIATELY PRECEDING THE INSTITUTION OF FORMAL CHARGES.

Petitioners submit that the Sixth Circuit Court of Appeals has decided important questions of federal law with respect to the availability of absolute immunity to state prosecutors who interview complaining witnesses and draft search warrant applications immediately preceding the initiation of formal criminal charges. These issues were specifically reserved ten years ago by this Court in *Imbler* v *Pachtman*, 424 US 409, 96 S Ct 984, 47 L Ed 2d 128 (1976) and warrant resolution at this time as a result of the divergent results reached by the various federal appellate courts on these issues. These circumstances fall within the considerations enumerated in Rule 17.1(a) and (c) as indicative of the character of reasons which may warrant granting of a petition for writ of certiorari.

In *Imbler* v *Pachtman, supra,* this Court held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune for damages under § 1983." *Id.*, at 431. The *Imbler* case did not require this Court to characterize all activities of a prosecutor which might be considered to be "intimately associated" with the criminal judicial proceeding — "It remains to delineate the boundaries of our holding." *Id.*, at 430. In footnote thirty-three, this Court discussed, without

deciding, the type of issues presented in the instant case:

> We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required, constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

Id., at 431.

In the decade following *Imbler* v *Pachtman*, the Courts of Appeals have employed differing standards and reached contradictory results as to whether particular activities fall within the prosecutor's role as an advocate. Many of the appellate and trial level federal courts have expressed their dismay with the lack of a definitive ruling from this Court. In *Grey* v *Bell*, 712 F2d 490, 499 (DC Cir 1983), the Court of Appeals remarked:

> Delineations of the precise scope of protected advocatory conduct beyond the boundaries estab-

> lished in *Imbler* has proved to be exceedingly difficult. . . . There is no clear consensus on how to properly characterize all of the various forms of prosecutorial conduct. This lack of consensus is plainly attributable to an absence of any settled approach to determining when absolute immunity applies.
>
> (footnotes deleted)

See also, Rex v *Teeples*, 753 F2d 840, 845 (10th Cir 1985) (Dissenting opinion noted the difficulty in attempting "to slice the prosecutor's activities into neat niches"); Comment, *Section 1983 and Prosecutorial Immunity: Marrero* v *City of Hialeah, 625 F2d 499 (5th Cir 1980)*, 19 Amer. Crim. L. Rev. 81 (Fifth Circuit's failure to recognize that certain investigative acts are quasi-judicial); Note, *Supplementing the Functional Test of Prosecutorial Immunity*, 34 Stan. L. Rev. 487 (1982); *Klitzman* v *Krut*, 591 F Supp 258, 263 (DNJ 1984); *Ginter* v *Stallcup*, 641 F Supp 939, 963 (ED Ark 1986) ("Circuit Courts of Appeals have been struggling to determine the outer boundaries of the prosecutor's absolute immunity"); and *Hooper* v *Sachs*, 618 F Supp 963 (DC Md 1985). All of these decisions and articles dramatically illustrate the difficulty experienced by the federal courts in attempting to delineate the boundaries of absolute immunity, the issue expressly reserved by this Court in *Imbler* v *Pachtman, supra*.

A. Interview Or Interrogation Of Complaining Witness Morrow

The Sixth Circuit held that Chief Assistant Prosecutor Thompson's interrogation of the complaining witness several hours before criminal charges were initiated could not be characterized as quasi-judicial conduct and that further factual development was required. In reaching this conclusion the Court of Appeals relied upon

Forsyth v *Kleindienst*, 599 F2d 1203 (3rd Cir 1979); *McSurely* v *McClellan*, 697 F2d 309 (DC Cir 1982); *Robichaud* v *Ronan*, 351 F2d 533 (9th Cir 1965); *Wilkinson* v *Ellis*, 484 F Supp 1072 (ED Pa 1980); and *Rose* v *Koch*, 465 F Supp 1157 (ED NY 1979); each of these cases is clearly distinguishable from the present case.

In *Forsyth* v *Kleindienst*, *supra*, the Third Circuit held that a limited factual inquiry was required to determine whether the securing of information was necessary to a prosecutor's decision to initiate criminal charges. The activity at issue was the authorization of wiretaps "primarily to gather intelligence information, although it was anticipated that information of a criminal evidentiary nature might also be obtained." 599 F2d at 1206. Significantly, the investigation never resulted in a prosecution. By remanding for a limited factual inquiry, the Court noted, "we recognize that this may result in some dilution of the protection of absolute immunity." *Id.*, at 1215. Clearly, the facts in *Forsyth* differ significantly from the instant case. The type of broad or general search for information in *Forsyth* which never culminated in prosecution is the opposite of the interview conducted here hours before the criminal complaint was issued.

Robichaud, *supra*, is a pre-*Imbler* decision of the Ninth Circuit which held that coercive interrogation by deputies at the direction of prosecutors outside the presence of plaintiff's attorney while plaintiff was in custody for murder might not constitute quasi-judicial conduct. This decision was rendered prior to *Miranda* v *Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1965) which guaranteed the types of protections with respect to in-custody interrogation which were allegedly violated in *Robichaud*, *supra*. In *Wilkinson* v *Ellis*, *supra*, the court simply states that plaintiff was interrogated and subsequently charged; however, it does appear that the prose-

cutors participated in the initial questioning of plaintiff at the police administration building.

Finally, in *Rose* v *Koch*, *supra*, the district court dismissed the complaints against the prosecutors recognizing that "it is important that some 'investigative' work be done by the prosecutor if he is properly to fulfill his functions in the judicial process." 465 F Supp at 1159. The court ultimately held allegations or inferences from the complaint, to the effect that the prosecutors "interviewed the witnesses to prepare the case," were activities entitled to absolute immunity. Petitioners submit that *Rose* v *Koch* provides no support for the Sixth Circuit's conclusion that further factual development is required.

In the present case a local police agency had talked with complainant Morrow before the prosecutors had any awareness of this matter. Clearly, the subsequent interview conducted by the prosecutor was to ascertain whether the elements of an obstruction of justice or compounding a felony charge existed.

It is significant that the petitioning prosecutors in this matter do not have an established grand jury available before which they could present witnesses and evidence as would be available in the federal system. Under Michigan law, the prosecuting attorney determines the initial criminal charge and his signed authorization is required before a magistrate may act. MCL 764.1(1) and *People* v *Matulonis*, 60 Mich App 143, 149; 230 NW2d 347 (1975). The Michigan courts have held that the prosecutor's statutory duties necessarily include the duty to investigate. *Bloss* v *Williams*, 15 Mich App 228, 233; 166 NW2d 520 (1968). When the prosecutor is charged with making the decision to initiate criminal proceedings, the courts have recognized a concomitant duty to exercise this discretion armed with the requisite facts:

> if it is the statutory duty of a prosecuting attorney to commence and prosecute criminal

> action, by necessary implication, he should qualify himself to determine, in the exercise of an honest discretion, if a prosecution should be commenced. The only way he can determine the question is to make an investigation of the facts and applicable law.

McKittrick v *Wymore*, 345 Mo 169, 183; 132 SW2d 979, 988 (1939). In addition, ethical considerations require the prosecutor to make an informed decision with respect to initiation of criminal charges. *See, ABA Standards for Criminal Justice*, The Administration of Criminal Justice, §§ 3.1(a) and 3.4(a). Although the general fact finding may be accomplished by police, the decision as to which law may have been violated under the circumstances requires the special expertise of the prosecutor in applying the state criminal statutes to the particular facts. This decision becomes more crucial when the criminal activity does not involve matters routinely handled by local police as in the present matter.

In the present case, dissenting Judge Nelson characterized the interrogation of Morrow as part of the process of initiating a prosecution:

> It seems to me that the interrogation of Morrow, which dealt with facts critical to the prosecution of Lawrence and Frank Joseph and which took place on the very day the prosecution was initiated, was so clearly an integral part of the initiation of the prosecution that further fact finding would be pointless.

795 F2d at 562.

Several circuit courts of appeals have enunciated the boundaries of absolute immunity in language that would clearly encompass the interrogation of Morrow. In

Barrett v *U.S.*, 798 F2d 565, 571-72 (2nd Cir 1986), the Second Circuit stated:

> The absolute immunity accorded to government prosecutors encompasses not only their conduct of trials but all of their activities that can fairly be characterized as closely associated with the conduct of litigation or potential litigation . . .

In *Freeman* v *Hittle*, 708 F2d 442 (9th Cir 1983), the court held: "Investigative functions carried out pursuant to the preparation of a prosecutor's case also enjoy absolute immunity. *Atkins* v *Lanning*, 556 F2d 485, 488-89 (10th Cir 1977)." *Id.*, at 443.

The Ninth, Fifth and Eleventh Circuits have held that interviewing witnesses is protected by absolute immunity. *See, Demery* v *Kupperman*, 735 F2d 1139 (9th Cir 1984); *Cook* v *Houston Post*, 616 F2d 791 (5th Cir 1980); and *Fullman* v *Graddick*, 739 F2d 553 (11th Cir 1984).

In *Demery, supra*, the plaintiff alleged that the prosecutor induced false testimony when conferring with witnesses for the purpose of determining whether charges should be brought against plaintiff. The Ninth Circuit held that such conduct clearly fell within the ambit of absolute immunity:

> We think that conferring with potential witnesses for the purpose of determining whether to initiate proceedings is plainly a function "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 US at 430, 96 S Ct at 995, and is therefore a quasi-judicial function "to which the reasons for absolute immunity apply with full force." *Id.* We doubt that such a function can be characterized as "administrative" or "investigative. . . ." But even if it could be so characterized, Kupperman is immune under our

> holdings in *Freeman* and *Ybarra,* for conferring with potential witnesses regarding their knowledge of underlying events is plainly part of a prosecutor's preparation of his case.

Demery, supra, at 1144.

Absolute immunity for interviewing witnesses was afforded to prosecutors by the Fifth Circuit in *Cook* v *Houston Post, supra,* 616 F2d at 793:

> Collins [Assistant District Attorney] would have been negligent in his duties as a prosecutor had he not interviewed witnesses before presenting their testimony to the Grand Jury.

In *Fullman* v *Graddick, supra,* plaintiff alleged that the Attorney General assisted in a "Star Chamber" interrogation of plaintiff and conspired with others to create and/or proffer perjured testimony. The Eleventh Circuit held that these alleged activities were quasi-judicial and entitled to the protection of absolute immunity. *Fullman, supra,* 739 F2d at 559.

An examination of the cases where the activity of interviewing or interrogating of witnesses has been afforded only qualified immunity reveals factual scenarios significantly different than the instant case. In *Rex* v *Teeples, supra,* 753 F2d 844, the court held that interrogation of a "*general* suspect" would not be afforded absolute immunity where the interview was conducted four days prior to the initiation of charges. Clearly, the *Rex* decision is readily distinguishable because a particular suspect had not been identified and the interview occurred days prior to the charge. *See also, In Re Scott County Master Docket,* 618 F Supp 1534 (DC Minn 1985) (interviews conducted months before charge).

B. Preparation Of And Application For Search Warrant

The Sixth Circuit held that a factual inquiry was required to determine whether the preparation of a search warrant was necessary to the decision to prosecute or whether such conduct constituted investigatory conduct. *Joseph* v *Patterson, supra,* 795 F2d at 556. The Sixth Circuit also noted that any participation by an unnamed prosecutor in an illegal search would not be protected by absolute immunity.[2]

As previously noted, the search warrant was issued contemporaneously with the criminal complaint and arrest warrants. The preparation or drafting of the search warrant was obviously undertaken within hours preceding issuance of the criminal complaint. The search was executed after respondents were formally charged.

In support of its decision reversing the district court's ruling that absolute immunity was applicable, the Sixth Circuit relied upon *Marrero* v *City of Hialeah,* 625 F2d 499 (5th Cir 1980); *Robichaud* v *Ronan, supra; Forsyth* v *Kleindienst, supra;* and *Bushouse* v *County of Kalamazoo,* 93 F.R.D. 881 (WD Mich 1982). In *Marrero, supra,* the Fifth Circuit held that "a prosecutor who assists, directs or otherwise participates with, the police in obtaining evidence *prior to an indictment* undoubtedly is functioning more in his investigative capacity." 625 F2d at 505 (emphasis added). *Forsyth* and *Bushouse* both involve searches prior to the initiation of criminal charges and in both cases the courts sought additional factual development. The pre-*Imbler* decision in *Robichaud* did not involve search and seizure.

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[2] Petitioners will not address this issue inasmuch as none of the named defendant prosecutors participated in the search; the limitations period would foreclose asserting such a claim against unnamed prosecutors.

Petitioners are aware of only one case examining the application for search warrant contemporaneous with the institution of criminal charges. In *Maxfield* v *Thomas*, 557 F Supp 1123 (D Idaho 1983), a criminal complaint against plaintiff was filed and a search warrant issued authorizing a search of plaintiff's business on the same day (the opinion does not indicate whether these matters were handled at the same hearing as in the instant case). The search warrant was executed on the following day and a second search warrant was obtained. Approximately one week later additional charges were filed against plaintiff. The district court held that the drafting and application for the search warrant fell:

> within the quasi-judicial function of initiating a prosecution and presenting the state's case. The rationale for the court's finding pertaining to this theory of recovery is that the searches of plaintiff's business premises were conducted subsequent to the filing of a criminal complaint . . . Additionally, the actions complained about by plaintiff under this theory of recovery fall within the quasi-judicial function of the prosecutor since the claim pertains to the preparation of an application for the search warrants. This portion of the plaintiff's theory of recovery does not pertain to the actual execution of the warrants. Thus, the court finds Defendant Harris is absolutely immune from plaintiff's third claim for relief to the extent that plaintiff's claim is based upon Defendant Harris' activities in the preparation of and application for the search warrants.

Id., at 1129-30. *See also, Groff* v *Eckman*, 525 F Supp 375 (ED Pa 1981).

All other cases examining this issue addressed pre-prosecution searches. *See, McSurely* v *McClellan, supra;*

Forsyth v *Kleindienst, supra*; *Higgs* v *Florey*, 713 F2d 840 (Colo 1986) (*en banc*) (no absolute immunity for drafting search warrant two weeks prior to filing charges); *Hooper* v *Sachs, supra* (no absolute immunity for search and seizure conducted months before indictment).

The dissenting Judge Nelson equated the obtaining of search warrants with the securing of arrest warrants for which the majority afforded petitioners absolute immunity. 795 F2d at 561. Judge Nelson referred to the acknowledgment by counsel for respondents that the act of seeking arrest and search warrants would fall within the quasi-judicial function. *Id.*

Obviously, the decision to prosecute respondents also necessitated action to preserve evidence that was essential to the prosecutor's case, specifically, the note evidencing the transfer of money from respondents to Morrow. Toward this end, the prosecutors prepared and applied for a search warrant to insure that the note would not be destroyed. The decision as to what evidence should be preserved for use in a prosecution is clearly a quasi-judicial activity. In *Ybarra* v *Reno Thunderbird Mobile Home Village*, 723 F2d 675, 679 (9th Cir 1984), the Court of Appeals held:

> In acting either to preserve or release evidence, the primary consideration, viewed objectively, is whether the prosecutor needs the evidence to prosecute. . . . This decision goes to the heart of the advocate's role "in initiating a prosecution and in presenting the State's case."
>
> (citations deleted)

C. Conclusion

Petitioners submit that the confusion experienced in the trial level and appellate federal courts as to the

applicability of absolute immunity deserves resolution by this Court. The purposes underlying immunity are only achieved when the prosecutor knows the boundaries of absolute immunity so he may act with assurance within that structure.

The dilemma faced by trial courts, in light of the various tests employed by appellate courts, is perhaps most graphically illustrated by the opinion in *Hooper* v *Sachs, supra*. In that case, seven pages of the court's opinion are consumed with a discussion of the various guidelines and tests employed in previous decisions; however, the court ultimately decides in favor of a harsh rule which achieves ease in application but fails to examine the character or purpose of the conduct at issue.

The instant case presents a situation where activity undertaken in the hours preceding initiation of charges is entitled to absolute immunity. To require factual inquiry in these circumstances will unnecessarily dilute the protection of absolute immunity. In addition, the lack of certainty concerning the availability of absolute immunity in cases similar to the instant case may encourage prosecutors to make uninformed decisions to initiate prosecutions.

Although the facts of this case would be easily resolved by consideration of temporal proximity, such a rule would not serve to resolve cases where the interview or drafting of the search warrant occurred days or weeks prior to the initiation of a prosecution. It is imperative that activities such as those undertaken here not be automatically characterized as "police activities" but that the courts recognize such conduct is undertaken by prosecutors for purposes distinct from police functions.

Petitioners urge that this Court adopt a standard recognizing that activities undertaken for the purpose of

making an informed decision as to whether or not a prosecution will be initiated will be protected by absolute immunity. This standard was described in the well-reasoned decision of the district court in *Schieb* v *Humane Society of Huron Valley*, 582 F Supp 717 (ED Mich 1984):

> The *Imbler* Court focused its attention upon the prosecutor's decision to bring charges or not, and the conduct of a criminal prosecution once the charges were brought. Several decisions from the Courts of Appeal have recognized that a rigid distinction between advocacy and investigative functions was impractical and somewhat disingenuous, inasmuch as those functions are inextricably intertwined in the mind of the prosecutor. This Court believes that a further dissection of investigative activities between "pre-decision to charge" and "post-decision to charge", or "pre-selection of a target" and "post-selection of a target" is equally unwise. Fair and effective enforcement of the criminal laws is furthered by encouraging the prosecutor to explore, as fully as possible, all available sources of information prior to making a determination about whether to proceed to prosecution, to refrain from prosecution, or to dismiss a prosecution improvidently brought.
>
> * * *
>
> Any activity which occurs prior to the bringing of criminal charges, the obvious purpose of which is to inform the decision of whether or not to charge, would be protected. Thus, such activities as interviewing witnesses, consulting with police, or even as here, taking part in the formulation of an operation to ascertain the identity of persons inclined to violate the criminal laws have as their obvious purpose the accumulation of information

> concerning the potential criminal liability of suspects. The prosecutor must be free to engage in this kind of activity if he is to faithfully discharge his duty to vigorously enforce the criminal laws.

Id., at 724.

This standard clearly falls within the parameters of *Imbler* v *Pachtman, supra,* wherein this Court recognized "that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," *id.*, 424 US at 431, while limiting the scope of absolute immunity to only those activities which are designed to inform the prosecutor as to his decision of whether or not to charge.

II.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IMPROPERLY HELD THAT PETITIONER CASE WAS NOT ENTITLED TO ABSOLUTE IMMUNITY AS A MEMBER OF THE CONCEALED WEAPONS LICENSING BOARD BECAUSE THE SIXTH CIRCUIT BASED ITS RULING UPON MISTAKES OF FACT AND LAW.

Petitioners submit that the Sixth Circuit's ruling that Defendant Case, who served pursuant to Michigan statute as a member of the Oakland County Concealed Weapons Licensing Board, is entitled to only qualified immunity, was founded upon mistakes of fact and law. The Sixth Circuit's decision, which ignored the Michigan law controlling at the time of the underlying proceedings and which was rendered without pertinent facts, departs so far from the accepted and usual course of judicial proceedings as to warrant an exercise of this Court's power of supervision pursuant to Rule 17.1(a) of this Court.

The arguments and authorities cited by petitioners to the trial court and to the Sixth Circuit focused on whether a prosecutor who sits on a C.W.L.B. is entitled to absolute immunity because this activity is mandated by Michigan statute, specifically MCL 28.426. The Sixth Circuit recognized that prosecutors' statutorily mandated activities had been afforded absolute immunity by a number of courts citing decisions which petitioners raised in their brief. 795 F2d at 557, citing *Campbell* v *Patterson*, 724 F2d 41 (6th Cir 1983); *Cribb* v *Pelham*, 552 F Supp 1217 (DSC 1982); and *Mother Goose Nursery Schools* v *Sendak*, 770 F2d 668 (7th Cir 1985). The recent decision in *Henderson* v *Lopez*, 790 F2d 44, 47 (7th Cir 1986) also held that the statutorily mandated activity of furnishing legal advice is entitled to absolute immunity.

Although the applicability of *Butz* v *Economou*, 438 US 478, 98 S Ct 2894, 57 L Ed 2d 895 (1978) to the present case was raised in questioning by one of the Sixth Circuit judges during oral argument, supplemental briefs or facts concerning the C.W.L.B. proceedings were not requested.

The Sixth Circuit concluded that only qualified immunity would be available to members of the C.W.L.B. based upon three factors: 1) the C.W.L.B. does not adjudicate in the classic sense; 2) the prosecutor would not be impartial or independent; and 3) the C.W.L.B. is not subject to the Michigan Administrative Procedures Act. 795 F2d at 558.

Despite the fact that the Sixth Circuit took judicial notice of a state court decision on March 7, 1984 reversing the decision of the C.W.L.B. which reduced respondent's license from a general to restricted permit, the Sixth Circuit did not apply the Michigan law applicable on or before March 7, 1984. *Id.*

The controlling Michigan law during the pendency of respondent's C.W.L.B. proceedings was the Michigan Court of Appeals' decision in *Hanselman* v *Killeen*, 112 Mich App 275; 316 NW2d 237 (1982):

> The Michigan concealed weapon licensing boards administer a statewide program and are part of a statewide system. The legislature has indicated its intent to include the boards within the APA definition of an "agency." Accordingly, *we hold that the defendant licensing board must comply with the requirements of the APA.*
>
> (emphasis added)

Id., at 281. This Michigan Court of Appeals decision controlled the operation of C.W.L.B. until July 19, 1984 — approximately four months after respondent's C.W.L.B. proceedings had terminated — when the Michigan Supreme Court rendered its decision in *Hanselman* v *Wayne County Weapon Board*, 419 Mich 168; 351 NW2d 544 (1984), which held that C.W.L.B. proceedings were not governed by the APA.

In reaching its decision, the Sixth Circuit placed substantial reliance on the Michigan Supreme Court's *Hanselman* decision as well as the importance the applicability of APA safeguards had played in this Court's previous decisions in *Butz* v *Economou*, *supra*, and *Cleavinger* v *Saxner*, 474 US ___, 106 S Ct ___, 88 L Ed 2d 507 (1985). 795 F2d at 558. The court below ignored the fact that the Michigan Court of Appeals' decision governed the proceedings at issue here and the Sixth Circuit proceeded lacking knowledge of pertinent facts such as the utilization of APA procedures during respondent's C.W.L.B. proceedings.

As previously noted, respondent's petition for judicial review in the state court specifically relied upon the

Michigan APA (*See*, Appendix "C"). The counsel for the C.W.L.B. in his memorandum of law also utilized the APA as the controlling procedure (*See*, Appendix "C").

In addition to the Sixth Circuit's failure to recognize the controlling Michigan law and its erroneous belief that respondent was not afforded APA safeguards, the Court of Appeals' reliance on *Cleavinger*, *supra*, ignores several important distinctions between the proceedings before the prison disciplinary committee in *Cleavinger* and the C.W.L.B. proceedings in the present case.[3]

As previously discussed, respondent herein utilized the APA whereas the petitioner in *Cleavinger* was afforded few of the APA's safeguards.

In *Cleavinger*, the prison disciplinary board was composed of prison officials who are not permanently assigned to the board and may even sit when they witnessed or played a significant part in the incident leading to the disciplinary action. 88 L Ed 2d at 510, n. 3. There is no opportunity for prisoners to have legal counsel. Although judicial review is ultimately available it can be achieved only after the prisoner proceeds through review by the warden and regional director of the Bureau of Prisons.

This Court in *Cleavinger* emphasized that the disciplinary board members are not independent because they are Bureau of Prisons employees, their immediate supervisor (the warden) reviews their decisions and their decisions involve credibility judgments between their fellow employees and prisoners. Similar factors are absent in the present case; the members of the C.W.L.B. are a

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[3] The *Cleavinger* decision was not briefed or argued below; that opinion was released over one year after briefs were filed in the Sixth Circuit and only one month prior to oral argument, where it was not raised by either the parties or the court.

prosecutor, county sheriff and state police representative; these individuals draw upon their law enforcement expertise but are not presented with situations arising from their own workplace, where they would be called upon to judge the credibility of their fellow employees. The initial review of the C.W.L.B. decision was made by a state judge of the Oakland County Circuit Court, not the immediate supervisors of board members. While the impartiality of disciplinary board members is severely affected by the fact that they must literally "live with" their decision because it involves the institution where they work, no such influences are present here.

Accordingly, the lack of independence and impartiality noted in *Cleavinger* with respect to prison disciplinary board members has no analogy in the present case.

Another significant difference between *Cleavinger* and the instant case is that judicial review was immediately available to respondent, whereas the petitioning prisoner had to proceed through two more intra-agency levels of review in the Bureau of Prisons before ultimately reaching judicial review.

Other important distinctions between the *Cleavinger* administrative proceedings and the proceedings in this case include the presence of respondent's attorney during the hearing, the existence of a verbatim record and thirteen days' notice to respondent and his attorney as opposed to the six days afforded in *Cleavinger*.

Petitioners submit that the C.W.L.B. proceedings are comparable to other licensing boards which have been afforded absolute immunity. In *Reed* v *Village of Shorewood*, 704 F2d 943, 951-952 (7th Cir 1983), the local liquor control commissioner, who renders decisions on liquor license renewal and revocation, was afforded absolute immunity despite the inapplicability of the

APA. Although *Reed* v *Village of Shorewood, supra,* involved a local official, his activities with respect to licensing were governed by state statute as are the C.W.L.B. in the present case. *Accord, Ashbrook* v *Hoffman,* 617 F2d 474, 476-77 (7th Cir 1980) (partition commissioners afforded absolute immunity).

Absolute immunity was also afforded to members of the Mississippi State Tax Commission by the Fifth Circuit in *Chiz's Motel* v *Mississippi State Tax Commission,* 750 F2d 1305 (5th Cir 1985) with respect to its decision as to classification of certain land as resort property under state law and as to renewal of an on-premises liquor retailer's permit. The commission's hearing procedure included the opportunity for the licensee to be represented by counsel, present evidence and appeal through the state administrative process.

Based on the foregoing, petitioners submit that the Sixth Circuit's opinion as to the C.W.L.B. should be reversed because it is founded upon mistakes of law and fact.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: November 14, 1986

APPENDICES

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APPENDIX A

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed July 2, 1986)

(LAWRENCE E. JOSEPH and R. FRANK JOSEPH, Plaintiffs-Appellants, v. L. BROOKS PATTERSON, RICHARD THOMPSON, DAVID CASE, individually and in their capacities as Oakland County Prosecutors; JAMES A'HEARN and ROBERT LEON, individually and in their capacities as members of the Oakland County Prosecutor Office Investigation Division and/or of the Oakland County Organized Crime Strike Force; Jointly and Severally, Defendants-Appellees — ON APPEAL from the United States District Court for the Eastern District of Michigan; No. 84-1332)

Before: JONES and NELSON, Circuit Judges;
and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge, delivered the opinion of the court, in which JONES, Circuit Judge, joined. NELSON, Circuit Judge (pp. 23-33*) delivered a separate opinion in which he concurred in part and dissented in part.

PECK, Senior Circuit Judge.

Lawrence and R. Frank Joseph appeal the district court's dismissal of their complaint pursuant to Fed. R.

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* [*Original pagination; cf. A-23–A-35.*]

Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The Josephs brought this action under 42 U.S.C. § 1983 against three county prosecutors and two investigators employed by the county prosecutor's office for alleged civil rights violations.[1] The issue on appeal is whether the district court erred in finding that dismissal was required by *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), in which the Supreme Court held that a prosecutor is immune from a § 1983 damages suit for alleged civil rights violations committed "in initiating a prosecution and in presenting the State's case." *Id.* at 431. For the reasons stated below, we reverse the district court's judgment and remand this case to the district court for further proceedings consistent with this opinion.

I.

For purposes of evaluating a motion to dismiss pursuant to Rule 12(b)(6), we must regard the factual allegations in the complaint as true. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); *Windsor* v. *The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 83 L.Ed.2d 50 (1984). The claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Windsor*, 719 F.2d at 158. The Josephs allege the following material facts derived from the joint pre-trial statement and certain paragraphs of their complaint expressly incorporated into the pre-trial statement. These facts are not well developed in the record, and are disputed by appellees, who include the Oakland County (Michigan) Prosecuting Attorney, Brooks

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[1] The complaint originally also named as defendants the City of Birmingham, its police chief, a police officer, and other municipal departments; however, these defendants entered into a settlement agreement with the appellants the day before trial.

Patterson; his chief assistant Richard Thompson; assistant prosecuting attorney, David Case; Chief of the Prosecuting Attorney's Investigative Division, James A'Hearn; and A'Hearn's investigator, Robert Leon.

Starting as early as 1978, A'Hearn and Thompson expressed the belief that the Josephs were allied with organized crime and wanted to "get" them. As a result, appellees entered into a concerted action with the police to bring false criminal charges against the Josephs, as evidenced by a series of events all of which occurred March 14, 1980. George Joseph, a younger brother, was involved in an altercation during the early morning hours of March 14 with an acquaintance, Hal Morrow. Morrow filed a complaint against George Joseph alleging felonious assault and extortion. Morrow was contacted by Lawrence Joseph regarding payment for the damages he had suffered from George Joseph's acts. At the behest of the police, Morrow secretly taped the telephone conversation with Lawrence Joseph and "played along" with Joseph in an attempt to entrap him into a criminal act. Morrow later met with Lawrence Joseph, accepted $800.00 as restitution and damages, and signed a release from claims for civil liability. Morrow then attempted to withdraw his complaint against George Joseph and initially concealed from the police his acceptance of the $800.00. The police arrested Morrow and telephoned A'Hearn, who contacted Thompson. Thompson and A'Hearn, in conjunction with the police, interrogated, intimidated, and coerced Morrow into filing false criminal charges against both Lawrence and Frank Joseph for obstructing justice and compounding a felony. Further, although a writ of habeas corpus had been issued by the 48th District Court of Michigan for George Joseph, who was still in custody, appellees ignored the writ and transferred George Joseph to the Oakland County Circuit Court for arraignment. The appellees used this opportunity to have the Circuit Court

sign complaints and arrest warrants against Lawrence and Frank Joseph based on Morrow's coerced statements. These were immediately executed against the Josephs at the 48th District Court where they were waiting with George's counsel for his expected appearance on the writ of habeas corpus. The appellees had also obtained a search warrant from the Circuit Court allowing them to search Lawrence Joseph's business premises for the release executed by Morrow, the evidence of the alleged attempt to obstruct justice. However, the search, which was conducted simultaneously with the Josephs' arrests and which shut down the store during business hours, was unlawfully expanded to include a search of the entire premises for business records, contraband liquor and cigarettes which were never found. The release was, however, recovered. Appellees A'Hearn, Leon and one prosecutor were present at the search.

All charges against Lawrence and Frank Joseph were dismissed upon preliminary examination by the 48th District Court. The appellees, with knowledge of the falsity of the charges, nonetheless appealed the dismissal to the Oakland County Circuit Court, which affirmed the dismissal, and the Michigan Court of Appeals denied leave to appeal. Thereafter, appellees opposed the Josephs' efforts to have their records expunged and certain properties returned to them. Further, appellees released or caused to be released to the media derogatory information about the Josephs. Finally Chief Assistant Prosecutor Richard Thompson influenced Assistant Prosecutor Case, a permanent member of the Oakland County Concealed Weapons Licensing Board, to "flag" Lawrence Joseph's concealed weapons licensing file and

to reduce his long-standing general permit to a restricted permit.[2]

Based on these alleged events, the Josephs filed the complaint in the present action on August 2, 1982, alleging violations of 42 U.S.C. §§ 1983, 1985, and 1986, as well as pendent state claims for intentional infliction of mental distress, intentional interference with business relations, malicious prosecution, false arrest, false imprisonment, invasion of privacy, and illegal search and seizure. The appellees raised absolute immunity in their Rule 12(b)(6) motion to dismiss, which was granted by the district court on February 2, 1984, the morning of trial. In making its decision, the district court did not require an evidentiary hearing or affidavits. The district court found that the prosecuting attorneys were entitled to absolute immunity under *Imbler*. Although not specifying the type of immunity to be accorded investigators A'Hearn and Leon, the district court found that they too had immunity. Having thus dispensed with the federal claims, the district court also dismissed the pendent state claims. This appeal ensued.

II.

The parties agree that *Imbler* controls this case, and the proper interpretation of *Imbler* is at the core of this dispute. In *Imbler* the Supreme Court extended absolute or quasi-judicial immunity to prosecutors when their "activities were intimately associated with the judicial phase of

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[2] Although not part of the record on appeal, we take notice of the fact that the Oakland County Circuit Court reversed the Concealed Weapons Licensing Board's decision on the basis that the Board denied Joseph's due process rights by applying new and different standards to his application without affording notice and an opportunity to comply with the new standards. *Joseph* v. *Oakland County Concealed Weapons Licensing Board*, No. 82-247153 AA (Oakland County Circuit Court, March 7, 1984).

the criminal process." 424 U.S. at 430. In that case absolute immunity applied to a state prosecutor who had been accused in a § 1983 action with knowing use of perjured testimony. The Supreme Court narrowly held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431. The Court expressly reserved the issue of whether "similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate." *Id.* at 430-31.[3] Notably, the Supreme Court cited and left standing several appellate court decisions which had extended only qualified or good-faith immunity to prosecutors who engaged in investigative or administrative activities. *Id.* at 430 n. 31.[4] The court further recognized:

> that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and

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[3] The Supreme Court recently recognized again that *Imbler* left open this issue, and declined to express any view on it. *Pembaur* v. *City of Cincinnati*, 43 U.S.L.W. 4289, 4291 n. 2 (March 25, 1986).

[4] The Supreme Court has also since indicated that a person immunized by his quasi-judicial functions is not excused from responding as a witness in legal actions against non-immunized co-conspirators. *Dennis* v. *Sparks*, 449 U.S. 24, 30-31 (1980).

> evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

Id. at 431 n. 33.

The Josephs assert that the prosecutors' alleged conduct in this case — coercive interrogation of a witness, false statements to support a complaint, arrest warrants and a search warrant, participation in an unlawful search, and malicious prosecution — constituted investigative activities not protected by absolute immunity. Similarly, they charge that the prosecutor's opposition to Lawrence Joseph's general concealed weapons permit and to expungement of their records are administrative acts outside *Imbler*'s grant of absolute immunity. The Josephs finally assert that investigators employed by the prosecutor's office, whose roles often parallel those of police officers, have only qualified immunity for their alleged acts. Appellees counter that all of the prosecutors' activities were inextricably tied to the initiation of a prosecution or were undertaken pursuant to statutory mandate and were, therefore, entitled to absolute immunity. Appellees further contend that the investigators, when functioning as members of the prosecuting attorney's staff pursuant to his directives, should also be accorded absolute immunity.

III.

We first address the issue of the extent of prosecutorial immunity. The Supreme Court has consistently construed the liability of public officials under § 1983 in light of common law immunity principles and the interests behind them. *Briscoe* v. *LaHue*, 460 U.S. 325, 334-36 (1983); *Imbler*,

supra, 424 U.S. at 421; *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967).

As explained in *Briscoe*, which granted absolute immunity to a police officer witness who gave perjured testimony:

> The central focus of our analysis has been the nature of the judicial proceeding itself. Thus, in his opinion concurring in the judgment of *Imbler* . . . JUSTICE WHITE explained that the absolute immunity of public prosecutors was "based on the policy of protecting the judicial process." 424 U.S. at 439. He explained . . .
>
> > The reasons for this rule are also substantial. It is precisely the function of a judicial proceeding to determine where the truth lies. The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately resolving factual disputes . . . are such that those involved in judidial proceedings should be 'given every encouragement to make a full disclosure of all pertinent information within their knowledge.' *Ibid.*
>
> The common law's protection for judges and prosecutors formed part of a "cluster of immunities protecting the various participants in judge-supervised trials," which stemmed "from the characteristics of the judicial process." *Butz* v. *Economou*, 438 U.S. 478, 512 (1978) . . .
>
> In short, the common law provided absolute immunity for all persons . . . who were integral parts of the judicial process.

460 U.S. at 334-35. One particular justification underlying prosecutorial immunity is the need to insulate prosecutors

from unfounded, retaliatory lawsuits by angry defendants; such lawsuits would deter vigorous prosecution of cases, deflect prosecutors' energies, and ultimately harm the judicial process. *Imbler*, 424 U.S. at 424; *Windsor*, 719 F.2d at 164. Another significant justification for absolute immunity with regard to prosecutors' quasi-judicial activities is that the procedural safeguards inherent in the judicial system reduce the need for private damage actions as a means of redressing unconstitutional conduct. *Butz*, 438 U.S. at 512.

The Supreme Court has specified that in conducting immunity analysis pursuant to the foregoing common law principles and public policy considerations "immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe*, 460 U.S. at 342; *see Malley* v. *Briggs*, 54 U.S.L.W. 4243, 4245 (March 5, 1986) (law enforcement officer who obtained a warrant based on allegations in affidavit found not to establish probable cause was not entitled to absolute immunity); *Cleavinger* v. *Saxner*, 54 U.S.L.W. 4048, 4051-2 (Dec. 10, 1985) (prison disciplinary committee members not entitled to absolute immunity); *Mitchell* v. *Forsyth*, 105 S.Ct. 2806, 2813 (1985) (U.S. Attorney General not absolutely immune for unconstitutional conduct in pursuit of his national security function); *Butz*, 438 U.S. at 513-14 (executive branch officials who initiate and participate in adjudicatory functions before administrative agencies have absolute immunity); *Imbler*, 424 U.S. at 430. It is precisely as a result of this functional approach, which insulates only prosecutorial conduct that can be considered "quasi-judicial" and intimately related to the judicial process, that the Supreme Court in *Imbler* left standing appellate cases which did not extend absolute immunity to administrative or investigative acts of prosecutors. 424 U.S. at 430 (citing *Guerro* v. *Mulhearn*, 498 F.2d 1249 (1st Cir. 1974); *Hampton* v. *City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S.

917 (1974); *Robichaud* v. *Ronan*, 351 F.2d 533 (9th Cir. 1965); *Madison* v. *Purdy*, 410 F.2d 99 (5th Cir. 1969); *Lewis* v. *Brautigam*, 227 F.2d 124 (5th Cir. 1955)).

More recently, the Supreme Court implied its continuing approval of this functional distinction in observing that, since *Imbler*, the Courts of Appeals have generally ruled that prosecutors do not enjoy absolute immunity for acts taken in their investigative or administrative capacities, and that the Supreme Court has "at least implicitly drawn the same distinction" in its cases. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 811 n. 16 (1982). Admittedly, some activities of a prosecutor, particularly those relating to the initiation of a prosecution, fall within a "gray" area not easily classifiable as solely "quasi-judicial", investigative, or administrative in nature. One synonym for "quasi-judicial" conduct that we find helpful in this regard is "advocatory." *See Butz*, 438 U.S. at 512 ("[a]bsolute immunity is thus necessary to assure that judges, *advocates*, and witnesses can perform their respective functions without harassment . . ." (emphasis added)); *Imbler*, 424 U.S. at 431 n. 33 ("the duties of a prosecutor in his role as *advocate* for the State involves actions preliminary to the initiation of a prosecution" (emphasis added)); *Gray* v. *Bell*, 712 F.2d 490, 499 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *McSurely* v. *McClellan*, 697 F.2d 309, 319 (D.C. Cir. 1982); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1214 (3d Cir. 1979). In other words, the critical inquiry is how closely related is the prosecutor's challenged activity to his role as an advocate intimately associated with the judicial phase of the criminal process. This so-called functional analysis cannot be conducted mechanistically, but must occur with an eye toward the common law and public policy underpinnings of absolute immunity. Having set forth these general principles of immunity, we consider the individual acts alleged in this case.

A. *Thompson's Alleged Interrogation of Morrow*

The Josephs allege that Chief Assistant Prosecutor Thompson interrogated Morrow while he was in police custody and coerced Morrow into making false statements which supported a later criminal complaint against the Josephs. Appellees contend that interviewing a witness is insulated activity, citing *Forsyth* in which the Third Circuit stated that granting absolute immunity to a prosecutor's decision to initiate a prosecution while subjecting him to liability for securing information necessary to that decision would be incongruous. 599 F.2d at 1215. However, while recognizing the prosecutor's need and "limited right to gather necessary information," the Third Circuit also foresaw that "this narrow exception could be distorted to include all of a prosecutor's investigative activities." *Id.* The court thus determined that summary disposition was inappropriate and that a factual inquiry was necessary to determine whether the securing of information was in furtherance of a decision to initiate prosecution, and was therefore quasi-judicial in nature, or whether it was in the course of supervising or conducting a law enforcement investigation. *Id.* at 1216. The latter may be fairly characterized "not [as] the protected decision to initiate prosecution, but rather the earlier, preliminary gathering of evidence which may blossom into a potential prosecution [and which therefore] is investigatory activity." *McSurely*, 697 F.2d at 320. We note that prosecutors who supervised and participated in an unconstitutional police interrogation of a criminal suspect were not entitled to absolute immunity in *Robichaud, supra*, 351 F.2d at 536-37. *See also Wilkinson* v. *Ellis*, 484 F. Supp. 1072 (E.D. Pa. 1980); *and see Rose* v. *Koch*, 465 F. Supp. 1157, 1159 (E.D. N.Y. 1979) (which distinguished interviewing witnesses to prepare testimony for proper presentation of the case from factual interviews "no different in kind from that of a police officer.") Because there are allegations which could sup-

port a finding that Thompson acted in an investigative capacity during the interview, we conclude that summary disposition was inappropriate. Remand is necessary for further development of the record on this issue before the district court can properly determine the nature and intent of the interview and whether absolute immunity should insulate Thompson from liability for this alleged act.

B. *The Issuance of Complaints and Arrest Warrants Based on False Statements*

Even taking as true, as we must for purposes of this appeal, the allegations that the prosecutors knowingly obtained issuance of criminal complaints and arrest warrants against the Josephs based on false, coerced statements elicited from Morrow by the prosecutors and police, we find that such conduct, however reprehensible, would be protected by absolute immunity. The decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in "initiating a prosecution," which is protected under *Imbler*, 424 U.S. at 431. *Martinez* v. *Winner*, 771 F.2d 424, 437 (10th Cir. 1985); *Lerwill* v. *Joslin*, 712 F.2d 435, 437-38 (10th Cir. 1983); *Macko* v. *Bryon*, 641 F.2d 447, 449 (6th Cir. 1981) (per curiam); *Hampton* v. *Hanrahan*, 600 F.2d 600, 632 (7th Cir. 1979); *Smart* v. *Jones*, 530 F.2d 64 (5th Cir.), *cert. denied*, 429 U.S. 887 (1976). To be sure there are some cases which hold that such conduct is not subject to absolute immunity either because it is viewed as investigatory activity, *McSurely*, 697 F.2d at 320, or because the prosecutor sought the warrant and filed the complaint out of a wholly personal motivation unrelated to his official duties, *Beard* v. *Udall*, 648 F.2d 1264 (9th Cir. 1981); *Brooks* v. *Fitch*, 534 F. Supp. 129 (D.N.J. 1981). However, we believe that securing the person of the defendant is part of initiating a prosecution and should be insulated. "Without the presence of the accused, the initiation of a prosecution would

be futile." *Lerwill*, 712 F.2d at 438. Moreover, extending absolute immunity to this function is consistent with the public policy and common law considerations outlined in *Imbler:*

> A prosecutor is duty bound to exercise his best judgment . . . in deciding which suits to bring. . . . The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. . . . [A] defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. . . . To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. 424 U.S. at 424-25, 427-28.

In addition, the judicial process is available to help safeguard the ultimate interests of the accused. Indeed, in this case the charges were dismissed upon preliminary examination by the circuit court.

C. *The Issuance of a Search Warrant and Participation in the Search*

The Josephs allege that the prosecutors sought issuance of a search warrant at the same time they filed the complaint and requested arrest warrants. The preparation of and application for the search warrant concededly fall in the "gray" area of immunity analysis because they display

characteristics of both advocatory and investigative functions. It can be argued that such "conduct is no more than 'initiating a prosecution and presenting the state's case. . . .'" *Groff* v. *Eckman*, 525 F. Supp. 375, 377 (E.D. Pa. 1981) (quoting *Imbler*, 424 U.S. at 431). On the other hand it has been observed that

> a prosecutor who assists, directs, or otherwise participates . . . in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities of "deciding which suits to bring and conducting them in court."

Marrero v. *City of Hialeah*, 625 F.2d 499, 505 (5th Cir. 1980) (quoting *Imbler*, 424 U.S. at 424), *cert. denied*, 450 U.S. 913 (1981); *see Maxfield* v. *Thomas*, 557 F. Supp. 1123, 1129 (D. Idaho 1983) (drafting and application for search warrant which was executed *after* filing of a criminal complaint constituted a quasi-judicial function as opposed to a pre-complaint application and search which would have constituted investigatory conduct); *see also Robichaud*, 351 F.2d at 533; *Lewis*, 227 F.2d at 124 (both cases, cited by *Imbler*, *supra*, hold that a prosecutor may function as an investigator merely by directing police-gathering functions).

Clearly, decisions of when and how to prosecute are not made in a vacuum, so that in some cases the directing of police to secure further evidence may be necessary to and part of a decision to prosecute. However, in other circumstances such activity may be merely investigatory. Consequently, a factual inquiry is necessary in order to determine the role in which this challenged activity was conducted. *Forsyth*, 599 F.2d at 1215; *Bushouse* v. *City of Kalamazoo*, 93 F.R.D. 881, 884 (W.D. Mich. 1982).

The Josephs also allege that an unnamed prosecutor participated in a search with the police of Lawrence

Joseph's grocery store; the search was not confined to the warrant. We have no doubt that such conduct, if true, is not subject to absolute immunity. *McSurely*, 697 F.2d at 320; *Marrero*, 625 F.2d at 505; *Hampton* v. *Chicago*, 484 F.2d at 609; *Maxfield*, 557 F. Supp. at 1130 (citing *Jacobson* v. *Rose*, 592 F.2d 515 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979)). As simply, but succinctly, stated in *Robichaud*, 351 F.2d at 536:

> If [a prosecutor] acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws?

Therefore, the district court erred in dismissing the case in light of the above allegations of investigatory conduct.

D. *Malicious Prosecution*

The Josephs further allege that the prosecutors engaged in abuse of process and malicious prosecution. Although the factual allegations on this point are scant, presumably the prosecutors' decision to pursue the charges and to appeal their dismissal underlies this allegation. These allegations, even though undeveloped, were appropriate for summary judgment. Such activity, even if malicious and founded in bad faith, is unquestionably advocatory and at the heart of the holding in *Imbler*. 424 U.S. at 424, 428. Absent absolute immunity, suits for malicious prosecution or abuse of process would be a common response by defendants when the State's case fails. *Id.* at 421. Such susceptibility to damages actions would inhibit prosecutors from aggressively prosecuting cases and would deflect their energies. *Id.* at 424-25. Subsequent to *Imbler*, it has been held that the rationale which supports absolute immunity at the trial level applies equally to appeals. *Henzel* v. *Gerstein*, 608 F.2d 654, 657 (5th Cir. 1979).

E. *Restriction of Lawrence Joseph's General Concealed Weapons Permit*

The Josephs allege that Chief Assistant Prosecutor Thompson influenced Assistant Prosecutor Case, a permanent member of the Oakland County Concealed Weapons Licensing Board, to investigate and reduce Lawrence Joseph's general permit to a restricted permit. They submit that such an activity is administrative and, therefore, subject only to the affirmative defense of qualified immunity. Appellees counter that the prosecutor should be accorded absolute immunity with respect to this activity, because the prosecuting attorney (or an assistant prosecutor chosen by him) is required by Mich. Comp. Laws Ann. § 28.426 to sit on the county-wide three-member concealed weapons licensing board. The appellees' argument that a statutorily mandated duty should be accorded absolute immunity has some force and has been a significant factor in several cases. *Mother Goose Nursery Schools, Inc.* v. *Sendak*, 770 F.2d 668, 671 (7th Cir. 1985), *cert. denied*, 88 L.Ed.2d 919 (1986) (Indiana Attorney General required by state law to review state contracts is absolutely immune); *Campbell* v. *Patterson*, 724 F.2d 41, 43 (6th Cir. 1983) (per curiam) (Michigan Attorney General obligated by statute to render opinions interpreting law at the request of state agencies was granted immunity for errors arising out of this function), *cert. denied*, 465 U.S. 1107 (1984); *Cribb* v. *Pelham*, 552 F. Supp. 1217, 1222 (D.S.C. 1982) (prosecutor's statutorily mandated duty to docket cases was accorded absolute immunity). However, the fact that a statute has mandated a duty is not dispositive in and of itself. In each of the above cases the courts expressly considered the *nature* of the challenged activity mandated by statute and whether it was quasi-judicial. *Mother Goose*, 770 F.2d at 671; *Campbell*, 724 F.2d at 43; *Cribb*, 552 F. Supp. at 1222. In all cases the acts were found

to be within the individual's advocatory or quasi-judicial functions. *Id.*.

We are not convinced that a prosecutor functions in his quasi-judicial capacity when sitting on a concealed weapons licensing board. The Michigan Supreme Court has held that concealed weapon licensing boards are not "state boards" or "agencies" subject to the provisions of the Michigan Administrative Procedure Act. Rather, they are local regulatory bodies created by state statute pursuant to the legislature's exercise of its police powers. *Hanselman* v. *Wayne County Concealed Weapon Licensing Board*, 419 Mich. 168, 196-97 (1984). Each board has exclusive authority to dispense or deny weapons permits in its county and "must determine 'proper reason' and 'suitability' [for a permit] based upon consideration of local needs and an exercise of its discretion." *Id.* at 189. The boards are composed of law enforcement officials [a prosecutor, police officer, and sheriff] to insure that the power to issue and revoke permits is "properly placed with those professionals most able to assess community needs and problems in this area." *Bay County Concealed Weapons Licensing Board* v. *Gasta*, 96 Mich. App. 784, 791 (1980). Further, it has been noted that the holder of a permit has only "a modicum" of interest in his permit, so that minimal procedural safeguards are required in revocation hearings. *Id.* at 790-91.

In view of all these facts we find *Cleavinger*, 54 U.S.L.W. 4048, instructive. In *Cleavinger* the Supreme Court found that a prison disciplinary committee performed adjudicatory functions in that they heard testimony, received evidence, and rendered decisions regarding inmates accused of infractions; however, the Supreme Court concluded that such activities did not rise to a "'classic' adjudicatory" function and accorded only qualified immunity to the committee members. The Court emphasized that the com-

mittee members were not professional hearing officers, as are administrative law judges. By virtue of their professional ties to the prison, neither were they truly independent and impartial, as are state and federal judges. Further, few of the procedural safeguards of the Administrative Procedure Act were present. The Court likened the committee to the school board members in *Wood* v. *Strickland*, 420 U.S. 308 (1975), who "adjudicated" violations of school regulations, but who were protected only by qualified immunity. The Court observed that absolute immunity would not significantly increase the officials' ability to exercise discretion so as to warrant the absence of a remedy for persons subjected to intentional and unjust deprivations.[5] *Cleavinger* is consistent with the Supreme Court's earlier holding in *Butz* that administrative law judges who adjudicate within an administrative agency enjoy absolute immunity because their duties are "functionally comparable" to those of a judge. In *Butz* the presence of Administrative Procedure Act safeguards and a structure insuring the adjudicator's independent judgment on the evidence, free from outside influences, were significant factors underlying the Court's decision. 438 U.S. at 512-13.

Although the Oakland County Concealed Weapons Licensing Board does perform some "adjudicatory" functions, it does not adjudicate in the formal, "classic" sense. Moreover, as law enforcement professionals who may have had occasion to deal with some applicants, the board members cannot be said to be impartial, independent, and

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[5] In *Cleavinger*, as in the instant case, judicial review of the board decision was available; however, this did not outweigh the other factors which favored qualified immunity. 54 U.S.L.W. at 4052. We also note that due to the recognition by Michigan courts of the wide discretion vested by the legislature in law enforcement official "professionals" to determine fitness for weapons permits, a great deal of deference appears to be accorded the boards' findings. *Bay County*, 96 Mich. App. at 791.

free from outside influences. Further, as noted by the Michigan Supreme Court, these boards are not subject to the Michigan Administrative Procedure Act, and are vested with wide discretion based on "local needs." Therefore, we conclude that only qualified immunity should be granted members of the Concealed Weapons Licensing Board, and dismissal on the basis of absolute immunity with regard to this activity was erroneous.

F. *The Prosecutors' Opposition to Expungement of the Record*

The Josephs allege that the prosecutors' continuing opposition to expungement of their records even after losing all appeals with regard to dismissal of the charges was an administrative act not to be accorded absolute immunity. Appellees, on the other hand, urge that Prosecuting Attorney's Policy Memorandum #38 requires routine opposition to all motions for expungement; they analogize this activity to filing an appeal or motion for a new trial. They conclude that such activity should be afforded the same absolute immunity received for trial proceedings.

Like the other issues raised on appeal, the facts are sketchy at best. In addition, it is questionable whether the prosecutor had any discretion at all, either as an administrator or advocate, to oppose expungement in light of Mich. Comp. Laws Ann. § 28.243 which provides for mandatory return of records in most cases. Mich. Comp. Laws Ann. § 28.243 provides in relevant part:

> (2) If a person accused . . . is released without a charge made against him or her, the official taking or holding an accused's fingerprints, arrest card, and description shall immediately return this information without the necessity of a request. If not returned, the accused shall

> have the absolute right to demand and receive the return at any time after the release and without the need to petition for court action.
>
> (3) If an accused . . . is found not guilty of the offense charged, the arrest card, the fingerprints, and description shall be returned to him or her by a court order signed by the trial court and directed to the official holding this information, which order shall issue automatically upon the finding of not guilty without the necessity of request therefor. If for any reason the order of return is not issued upon a finding of not guilty, the accused shall have the absolute right to the return, upon request, at any time after the acquittal. If the order of return is refused the accused, the accused shall have the right to petition the circuit court of the county where the original charge was made for a preemptory writ of mandamus to require issuance of the order of return.

The only exceptions to the mandatory return of the accused's record occur in cases where the person arrested has a prior conviction, aside from a misdemeanor traffic offense, or where the person arrested was charged with a sexual offense. In such cases a judge must by express order entered on the record order return. Mich. Comp. Laws Ann. § 28.243(6)(a) and (b). Therefore, remand is necessary to develop the facts on this issue. If the district court develops facts indicating that the circumstances require return pursuant to the clear mandate of § 28.243, clearly the prosecutors cannot be said to have engaged in advocatory conduct in furtherance of the judicial process, because there was nothing to adjudicate or advocate. On the other hand, if the facts demonstrate that due to a prior conviction a hearing or legal proceeding was conducted

with regard to a motion for expungement, the prosecutors were acting as advocates representing the state's interest in the judicial process.

IV.

Although the district court stated that investigators Leon and A'Hearn should not be accorded the same absolute immunity that prosecutors enjoy under *Imbler*, the court without explanation conferred upon them an unspecified form of blanket immunity: "[G]iven the facts that . . . we are dealing with . . . [i.e.] an investigation and then a warrant and search to get evidence to support a prosecution, I think that A'Hearn and Leon also have immunity." The Josephs raise this as their final assignment of error. The appellees, on the other hand, urge that investigators who carry out duties pursuant to the preparation of a prosecutor's case should enjoy the same immunity the prosecutor has. They contend that "it would hardly seem reasonable to exculpate the district attorney and not to immunize his underlinings," citing *Atkins* v. *Lanning*, 556 F.2d 485, 489 (10th Cir. 1977). We agree to a point.

Nonjudicial officials, who need protection from claims or harassment which would interfere with their duties, ordinarily are accorded qualified immunity. *See Cleavinger*, 54 U.S.L.W. at 4051 and cases cited therein. However, because immunity rests not on status or title, but function, nonjudicial officers are entitled to absolute immunity when they perform quasi-judicial functions. *See Briscoe*, 460 U.S. at 342; *Kurzawa* v. *Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984). Drawing upon this principle, a nonjudicial officer who takes ministerial actions intimately related to the judicial process pursuant to the express direction and control of a prosecutor, who is directing the activity in the fulfillment of a quasi-judicial responsibility, also has abso-

lute immunity. *Vicory* v. *Walton*, 721 F.2d 1062, 1066 (6th Cir. 1983) (Bertlesman, J., concurring), *cert. denied*, 105 S. Ct. 125 (1985); *Atkins*, 556 F.2d at 488-89; *DeBoer* v. *Martin*, 537 F. Supp. 1159, 1163 (N.D. Ill. 1982). In such a situation it can be said that the official is functioning as the *alter ego* of the prosecutor. However, when the nonjudicial official undertakes action on his own initiative or when he carries out administrative or investigatory functions of the prosecutor, he can only claim the affirmative defense of qualified immunity. In these instances, both the public policy and common law rationale which favor absolute immunity, as well as the checks and safeguards inherent in the judicial process, are absent.

On the face of the complaint there are allegations that A'Hearn was contacted directly by the police and in turn involved the prosecutor's office in an investigation of the Josephs' alleged obstruction of justice. It is also alleged that A'Hearn and Leon participated in an unconstitutional search. Such self-initiated and investigatory activities fall outside the circumstances delineated above which warrant absolute immunity. Therefore, the district court erred in dismissing the case as to Leon and A'Hearn.

V.

In the case of the investigators and, in some instances, the prosecutors, absolute immunity is not available; they must rely on the affirmative defense of qualified immunity. However, "[t]his less-than-absolute protection is not of small consequence." *Cleavinger*, 54 U.S.L.W. at 4052. This is so because the test for qualified immunity is that: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. As

observed in *Butz*, 438 U.S. at 506-07, "[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law. . . . [I]nsisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." The test for qualified immunity is an objective one to be applied by the trial court as a matter of law before discovery occurs. If the law which the defendant's conduct is alleged to have violated is clearly established, then the qualified immunity defense must fail and discovery proceed. If the law is not clearly established, the defendant is immune and summary judgment is proper. *Windsor*, 719 F.2d at 165.

The judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part.

Although I agree with much of what the court says, I must dissent from some of it.

I agree that the prosecutors are entitled to absolute immunity from liability for obtaining the issuance of criminal complaints and arrest warrants against Lawrence and Frank Joseph, and I therefore concur in Part III B of the court's opinion. I also agree with sections D, E and F of Part III.

As Part III C of the opinion indicates, the warrant for the search of Lawrence Joseph's store was obtained in the same court appearance in which the criminal complaints and arrest warrants were signed. The plaintiffs so allege in their complaint, and they also say that the search warrant was sworn to not by any of the Oakland County

defendants, but by a police officer named David Schultz. (Officer Schultz was in the employ of the City of Birmingham, and he has been dismissed from this case along with the other City of Birmingham defendants.) If any prosecutor was peripherally involved in obtaining the search warrant, I see no basis for distinguishing his conduct from the obtaining of the arrest warrants, which Part III B of the court's opinion holds is protected, without further inquiry, by absolute immunity. I note, in this connection, that plaintiff's own counsel conceded, before the trial court, that "it is true that perhaps the mere act of seeking of the arrest warrants *and the search warrant* could fall within the narrow quasi-judicial function [protected by absolute immunity] . . ." (Emphasis supplied.) I see no need for any further factual inquiry regarding issuance of the search warrant, and to the extent the court holds such inquiry necessary, I respectfully dissent. I agree with the court, however, that if a prosecutor participated with the Birmingham police in conducting a search that went beyond the authorization contained in the warrant, the prosecutor's immunity, if any, would be qualified and not absolute.

As to Part III A, where the court considers whether the interrogation of Hal Morrow was an insulated activity, it may be useful to review the precise allegations of the plaintiffs' complaint. The complaint says:

> "In the early morning hours of March 14, 1980, George Joseph, younger brother of Plaintiffs herein, was engaged in a confrontation and automobile chase with Defendant Morrow over a dispute in attempt to collect monies owed by Defendant Morrow to a mutual friend. Thereafter, Defendant Morrow lodged a Complaint with Defendant Shultz [sic] of the Defendant City of Birmingham Police Department against George Joseph and cer-

> tain of his friends and associates, alleging felonious assault and extortion."

The complaint goes on to say that Plaintiff Lawrence Joseph "and others" then met with Mr. Morrow, paid him $800.00, and obtained a document releasing George Joseph from civil liability. Thereafter, the complaint alleges,

> "Defendant David Schultz at the direction of others unknown to Plaintiffs and both City of Birmingham Police Department and Oakland County Prosecutor's Office caused Defendant Morrow to be arrested, transferred, interrogated, threatened, coerced, and intimidated into filing criminal charges and complaints against Plaintiffs, Lawrence Joseph and Frank Joseph, for 'obstructing justice' and 'compounding a felony', both being felony offenses. Defendants Thompson, A'Hearn and Schultz specifically took part in this process. These actions were taken in bad faith, maliciously, illegally and with knowledge of the wrongfulness thereof."

The interrogation of the unfortunate Mr. Morrow (who, it is stipulated, was never served and is not a party to this action) took place after the alleged assault and extortion by George Joseph, and after the meeting at which Mr. Morrow accepted the plaintiffs' $800.00, but before the court appearance in which the obstruction of justice complaints were signed and the warrants were issued against Lawrence and Frank Joseph. All of these events, as plaintiffs' counsel told the trial court, occurred on the same day — March 14, 1980. From a temporal standpoint, at least, there can be absolutely no doubt that what occurred at Morrow's meeting with Lawrence Joseph and others earlier in the day was intimately associated with the questioning of Morrow about the meeting and with the initi-

ation of the obstruction of justice case against Lawrence and Frank Joseph later that same day.

The older Josephs filed the instant lawsuit on August 2, 1982, and Oakland County defendants filed an answer to plaintiffs' complaint on September 23, 1982. We do not have the benefit of the extensive deposition testimony apparently elicited after the case was at issue, but it is instructive, I think, to see how plaintiffs' claims are characterized in the joint pretrial statement that the parties themselves filed with the trial court on November 15, 1983. After listing a series of claims that were being abandoned, the pretrial statement says:

> "[T]he [remaining] claims of the Plaintiffs might be succinctly stated as follows: * * * [Statement of claims against City of Birmingham Defendants omitted] * * * Further, Plaintiffs claim that the Birmingham Defendants, along with the Defendants associated with the Oakland County Prosecutor's Office and the Oakland County Organized Crime Strike Force, on or about March 14, 1980, used an incident involving Plaintiff's [sic] younger brother George Joseph in order to falsely accuse the Plaintiffs herein of 'obstruction of justice' and 'compounding a felony'. Having so falsely brought said charges against the Plaintiffs here in, the Defendants, and all of them, used said false charges to obtain a search warrant for 'Market Square' which search was conducted with intent to damage said business and to find evidence of other crimes than those that led to the issuance of said warrant. Thereafter, the Defendants, and each of them, pursued and prolonged the proceedings against the Plaintiffs in bad faith and without any hope of success for the purpose of harassing Plaintiffs, causing them expense and generating pub-

> licity calculated to put Plaintiffs in a bad light and to damage their economic enterprises and social relationships."

Far from suggesting that the interrogation of Hal Morrow was not "intimately associated" with the initiation of the obstruction of justice case that was begun on the very day the interrogation took place — "intimate association" being a test arguably suggested by the Supreme Court in *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976) — the pretrial statement never mentions the interrogation of Mr. Morrow at all.

On December 13, 1983, all but one of the Oakland County defendants moved for an order of dismissal on the ground that they were "protected by absolute or quasi-judicial immunity. . . ."[1] If the pretrial statement adequately preserves the claim that defendants Thompson and A'Hearn helped "coerce" Morrow into making the charges that led to the institution of the obstruction of justice case against Lawrence and Frank Joseph, the question presented to the trial court by the motion to dismiss was whether, in this context, the interrogation of Morrow was to be considered part of the process of "initiating a prosecution." That question, in my judgment, could only be answered in the affirmative.

"Clearly," as this court says in Part III C of its opinion, "decisions of when and how to prosecute are not made in a vacuum, so that in some cases the directing of police to secure further evidence may be necessary to and part of a

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[1] The motion purports to have been brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, but an answer to the complaint had been filed more than a year earlier. Technically, a Rule 12(b)(6) motion is untimely after the case is at issue and no further pleading is permitted. *Wright & Miller*, Federal Practice and Procedure: Civil § 1357. The plaintiffs have made no issue of this, and it seems appropriate to treat the defendants' motion as a motion for judgment on the pleadings.

decision to prosecute." It seems to me that the interrogation of Morrow, which dealt with facts critical to the prosecution of Lawrence and Frank Joseph and which took place on the very day the prosecution was initiated, was so clearly an integral part of the initiation of the prosecution that further fact-finding would be pointless.

I see nothing in *Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3rd Cir. 1979), that suggests otherwise. The defendants in *Forsyth* were former Attorneys General of the United States who had been sued for authorizing, on national security grounds, warrantless wiretaps. Unlike the interrogation of Mr. Morrow, the wiretaps *never* resulted in the initiation of a prosecution, as far as the opinion discloses, much less the initiation of a prosecution on the very day of the investigatory conduct complained of. In fact, as we know from the subsequent opinion in *Mitchell* v. *Forsyth*, ___ U.S. ___, 105 S.Ct. 2806, 2810 (1985), the trial court determined on remand that Attorney General Mitchell's wiretap authorization "was *not* intended to facilitate any prosecutorial decision or further a criminal investigation", and "Mitchell himself had *disavowed* any such intention and insisted that the only reason for the wiretap was to gather intelligence needed for national security purposes." (Emphasis supplied.) The main significance of *Forsyth* for our purposes, I think, is not that the Court of Appeals found it necessary to remand for further factfinding, but that the court explicitly confirmed that absolute immunity can attach to investigative activity occurring before there is a final decision to prosecute. As the court said:

> "To grant a prosecuting attorney immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decisionmaking and the potential for

needless actions. We believe that the right to make the decision without being subject to suit *must* include some limited right to gather necessary information." 599 F.2d at 1215. (Emphasis supplied.)

Expanding on dicta found in footnote 33 in the final paragraph of the Supreme Court opinion in *Imbler* v. *Pachtman*, 424 U.S. at 431, n. 33, the *Forsyth* court did go on to say "we are sensitive to the possibility that this narrow exception could be distorted to include all of a prosecutor's investigative activities." 599 F.2d at 1215. Accordingly, said the court, "[w]e hold only that to the extent that the securing of information is necessary to a prosecutor's decision to initiate a criminal prosecution, it is encompassed within the protected, quasi-judicial immunity afforded to the decision itself." *Id.* Applying that holding here, it follows that if the prosecutor's interrogation of Mr. Morrow was "necessary to [the] prosecutor's decision to initiate a criminal prosecution" against Lawrence and Frank Joseph, as I see no reason to doubt that it was, absolute immunity attaches.

Footnote 33 in *Imbler* suggests that "difficult questions" may be presented in determining the point at which a prosecutor's obtaining of evidence in preparation for the initiation of criminal proceedings crosses the line beyond which the prosecutor functions as an "administrator," thereby losing the protection of absolute (as opposed to qualified) immunity. That is obviously true, but I think we are nowhere near that point in the case at bar.

Some lower courts, as I read the cases, may have strayed away from binding Supreme Court precedent in concluding that a prosecutor engaged in functions "essentially investigative" has absolute immunity. See, *e.g.*, cases cited in *McSurely* v. *McClellan*, 697 F.2d 309, 318, 320 (D.C. Cir. 1982). Although the Supreme Court did say, in *Imbler*, that it had no occasion there to consider whether

reasons similar to those requiring absolute immunity for prosecutorial activities "intimately associated with the judicial phase of the criminal process" require immunity "for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate," 424 U.S. at 430-31, just such a question was answered affirmatively in *Yaselli* v. *Goff*, 275 U.S. 503 (1927), a case that *Imbler* cites with evident approval. 424 U.S. at 422.

In *Yaselli* v. *Goff*, as we learn from the opinion of the Court of Appeals reported at 12 F.2d 396 (2d Cir. 1926), Mr. Yaselli had filed pleadings alleging that defendant Goff, acting out of wrongful motives and pursuant to a conspiracy to prosecute Yaselli maliciously and without cause, had prevailed upon Attorney General A. Mitchell Palmer to appoint him a special assistant to the Attorney General "to assist in the *investigation* and prosecution" of Mr. Yaselli for defrauding the United States in connection with the purchase of a steamship from the U.S. Shipping Board. 12 F.2d at 399. (Emphasis supplied.) Yaselli's pleadings further alleged that defendant Goff conspired to obtain the appointment of a receiver for a shipping company of which Yaselli was president "and thereby obtain inspection of papers and documents upon which to base such prosecution." 12 F.2d at 398. The pleading alleged that defendant Goff caused the receiver wrongfully to seize personal records, knowing that they belonged to Yaselli and not the shipping company, and let defendant Goff inspect them in furtherance of the malicious prosecution. It was stipulated that after Goff accepted the appointment as a special assistant he appeared before a grand jury, presented evidence, and procured an indictment on which Yaselli was tried. Yaselli's acquittal at that trial was followed by a malicious prosecution against Goff.

In seeking a dismissal of the complaint, Defendant Goff moved to strike the pleading in which he had been accused of conducting an improper investigation. 12 F.2d at 399. The trial court granted the motion to strike and dismissed the complaint. *Id.* Yaselli appealed, and a panel consisting of Circuit Judges Rogers, Hough and Manton concluded that the pleading had been properly stricken and the trial court's judgment should be affirmed.[2]

The Supreme Court, in a per curiam decision, affirmed the judgment of the Court of Appeals on the authority of *Bradley* v. *Fisher*, 13 Wall. 335, 347 (1872), and *Alzua* v. *Johnson*, 231 U.S. 106, 111 (1913).

The former opinion, delivered for the Supreme Court by Mr. Justice Field in the year following enactment of the statute now codified at 42 U.S.C. § 1983, contains a detailed discussion of the history of the doctrine of absolute immunity and the policy reasons for concluding that judges ought not be required to defend themselves against suits charging that acts performed in their official capacity were done maliciously or corruptly. In the latter case the Supreme Court, speaking through Mr. Justice Holmes, said it was "fundamental" that the absolute immunity for judges would extend to a Justice of the Supreme Court of the Philippine Islands after those Islands were acquired by the United States. In applying the *Bradley* and *Alzua* cases to the situation in *Yaselli*, the Supreme Court necessarily held that Prosecutor Goff was

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[2] While Judge Manton did not write the opinion of the Court of Appeals, his presence on the panel reminds us that judges are no more immune from the temptation to abuse their powers than prosecutors are. The subsequent fate of Judge Manton, however, reminds us that judicial immunity from civil liability "does not leave the public powerless to deter [judicial] misconduct or to punish that which occurs." *Imbler*, 424 U.S. at 429. Noting that "[e]ven judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights," the *Imbler* court noted that "[t]he prosecutor would fare no better for his willful acts." *Id.*

entitled to the same kind of absolute immunity that applies to the official acts of judges — and that such immunity covered the conduct complained of in the stricken pleadings, including the securing of the appointment to prosecute Mr. Yaselli and the obtaining of Mr. Yaselli's personal papers and documents through improper means.

In *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), Chief Judge Learned Hand — whose tenure on the Court of Appeals outlasted that of Judge Manton, his sometime colleague — dealt with a situation where the trial court, like the trial court here, had dismissed the plaintiff's complaint under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The defendants in that case included two Attorneys General of the United States who were accused of having maliciously kept the plaintiff in custody for some years on the pretense that he was an enemy alien, when in fact he was not. The trial judge "held that the defendants had an absolute immunity from liability, even though their unlawful acts had been induced only by personal ill-will. . . ." 177 F.2d at 579. Acknowledging that it seemed "at first blush a startling proposition" that the complaint should not be permitted to stand even if read as specifically alleging that the defendants "had acted altogether from personal spite and had been fully aware that they had no legal warrant for arresting or deporting the plaintiff," Judge Hand, writing for himself and Judges Swan and Clark, said not only that this conclusion "necessarily follows from the decision of the Supreme Court in *Yaselli* v. *Goff*," 275 U.S. 503, "but that as a new question, the result is desirable." 177 F.2d at 580.

In a passage evincing the strength of mind and felicity of expression that contributed to Judge Hand's reputation as one of our better jurists, the opinion went on to say:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent a[s] well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." 177 F.2d at 581.

Judged as res nova, I might not consider it unfair to hold that the immunity of a prosecutor in respect of his official acts should be conditional only, and not absolute.

Judged as res nova, I might see no unfairness in remanding the case at bar for a factual determination of how "intimately associated" the interrogation of Mr. Morrow was with the decision to prosecute Lawrence and Frank Joseph. Because I do not believe that this is the path laid down by the Supreme Court, however, and because I think it is a foregone conclusion what the result of such a factual inquiry will be, I must respectfully dissent from Part III A of the court's opinion in the case at bar.

With respect to Part IV of the court's opinion, which deals with the two non-lawyer employees of a division of the Oakland County Prosecutor's Office called the "Criminal Investigation Division and Organized Crime Strike Force," I note that Mr. Leon, the assistant investigator, is not alleged to have participated in the interrogation of Mr. Morrow. Because it is claimed that he participated in the allegedly improper search of the [*sic*] Lawrence Joseph's store, however, and because Mr. Leon did not join in the motion to dismiss filed by the other Oakland County defendants, I agree that the district court acted prematurely in dismissing the case as to Mr. Leon.

Mr. A'Hearn, the Chief of the Criminal Investigation Division and Organized Crime Strike Force, is claimed to have taken part, with Police Officer David Schultz and Chief Assistant Prosecutor Richard Thompson, in the interrogation and alleged coercion of Mr. Morrow. I agree with the court that Mr. A'Hearn would be entitled only to qualified immunity, in respect of these activities, unless he was acting pursuant to the express direction and control of a prosecutor. The presence of Chief Assistant Prosecutor Thompson suggests to me that Mr. A'Hearn almost certainly was acting pursuant to such express direction and control, but I have no difficulty with letting this assumption be confirmed on remand as long as there must be further proceedings as to Mr. A'Hearn in any

event — and I agree with the court that such proceedings are required in order to clarify the role played by Mr. A'Hearn in the conduct of the search of Mr. Lawrence Joseph's store. I also agree that the judgment of dismissal must be reversed as to the three prosecutors because they had only qualified immunity in dealing with or sitting on the Concealed Weapons Licensing Board and in opposing expunction of the plaintiff's police records.

To the extent that the court's judgment authorizes further proceedings beyond the scope I have suggested is proper, I respectfully dissent. In all other respects, I concur in the judgment.

APPENDIX B

ORDER

(United States Court of Appeals for the Sixth Circuit)

(Filed August 19, 1986)

(LAWRENCE E. JOSEPH AND R. FRANK JOSEPH, Plaintiffs-Appellants, v. L. BROOKS PATTERSON, ET AL., Defendants-Appellees — No. 84-1332)

BEFORE: JONES and NELSON, Circuit Judges, and PECK, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, Clerk

APPENDIX C

— SELECTED LOWER COURT PLEADINGS —

(State of Michigan — Circuit Court — County of Oakland)

(LAWRENCE JOSEPH, Plaintiff, vs. OAKLAND COUNTY CONCEALED WEAPONS LICENSING BOARD, Defendant - Civil Action No. 82-247153 AA)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed September 13, 1982)

Now comes Plaintiff, Lawrence Joseph, by and through his attorney, Hugh M. Davis, Jr., P.C., and complains to this Honorable Court as follows:

1. That Plaintiff, Lawrence Joseph, is a resident of the County of Oakland, State of Michigan.

2. That Defendant, Oakland County Concealed Weapon Licensing Board, is a body empowered by MCLA 28. 426 to grant and issue licenses to carry concealed weapons in the County of Oakland.

3. That the decisions of said Board are appealable pursuant to the Administrative Procedures Act, MCLA 24.71 et. seq.

4. That Plaintiff claims injunctive relief pursuant to MGCR 718.

5. That Plaintiff, Lawrence Joseph, has, as a businessman required to carry large sums of money, possessed an unrestricted concealed pistol license, previously issued by both the City of Detroit and the County of

Oakland for a period of some fourteen (14) years prior to August 3, 1982.

6. That on July 10, 1979 the Oakland County Concealed Weapon Licensing Board issued Plaintiff a "concealed pistol license" with "no restrictions" and denominated as "general" from July 10, 1979 until July 10, 1982.

7. That Plaintiff timely reapplied for a renewal of said license prior to July 10, 1982.

8. That Defendant failed and refused to renew said license prior to the expiration date of July 10, 1982.

9. That Defendant granted a Hearing on Plaintiff's application for said license on August 3, 1982 and, as a result of said Hearing, issued Plaintiff a license which was restricted by the following language "while on business for Market Square" and "hunting and target".

10. That Plaintiff has been convicted of no crime, has been involved in no physical altercations and has not improperly used his concealed pistol license in any fashion in the period between July 10, 1979 and July 10, 1982.

11. That, at a time unknown to Plaintiff, one David Case, a member of Defendant Board and an employee of the Oakland County Prosecutor's Office, caused Plaintiff's file with Defendant Board to be "flagged", *inter alia*. This action took place at some point in time prior to the expiration of Plaintiff's previous license on July 10, 1979.

12. That the actions of David Case complained of here, individually and in his capacity as an employee of the Oakland County Prosecutor's Office, are the subject of litigation in the case of *Lawrence Joseph and Frank Joseph* v *City of Birmingham, Oakland County Prosecutor*, et al (USDC-ED MICH #82 72830).

13. That *Joseph* v *Birmingham, supra,* complains of a conspiracy to violate the civil rights of Lawrence Joseph and Frank Joseph, depriving them, *inter alia,* of their property and the ability to do business in the County of Oakland.

14. That Plaintiff asks no relief or damages regarding said violation of his civil rights in this Court based on the pendency of *Joseph* v *Birmingham, supra,* confining his claims here to his rights to appeal the Administrative Decision of Defendant and compel the issuance of a general concealed pistol permit to him.

15. That the actions of Defendant on August 3, 1982 in restricting Plaintiff's previously unrestricted concealed pistol license was carried out in bad faith, with fraudulent intent, without bias, arbitrarily and capriciously for the purpose of furthering the Oakland County Prosecutor's ongoing conspiracy with third parties to harass and intimidate Plaintiff.

16. That Plaintiff is suffering and has suffered irreparable harm in that he is forced to either expose himself to physical danger, loss of property, expensive security procedures and/or risk criminal prosecution by virtue of the actions of Defendant complained of herein for the following reasons:

a. He is still required to transport and deposit large sums of money from his place of business to various financial institutions and/or creditors on a daily basis at both regular and irregular times.
b. That attempting to carry out such activities on a restricted license subjects him to arbitrary arrest and prosecution for carrying a concealed weapon, wherein his claims of privilege would be reduced to a question of fact to be placed before the Tribunal, potentially subjecting him to a felony conviction.

c. That a felony conviction of any nature would subject him to the loss of his license to purvey alcoholic beverages from his place of business and/or own or transfer other such licenses.

d. That the loss of such licenses to purvey alcoholic beverages would effectively destroy his business at Market Square in the City of Birmingham, County of Oakland.

e. That he is therefore subject to the arbitrary whim of any law enforcement officer in the State of Michigan and particularly in the County of Oakland by virtue of the acts of Defendant complained of herein.

f. That the alternatives available to him under the present circumstances are prohibitively dangerous, expensive and/or impractical.

g. That this situation is present and continuing and constitutes irreparable harm by the acts of Defendant complained of herein and for which there is no adequate remedy at law.

17. That Plaintiff has timely and properly pursued all procedures available to him before the Administrative Tribunal and in the Courts of general jurisdiction. That the only record of the decision of the Administrative Tribunal below is the license itself, a copy of which is attached to this Complaint.

18. That there is no record of the proceedings below which could aid this Court in its determination of the facts and law.

WHEREFORE, Plaintiff, Lawrence Joseph, respectfully requests that this Honorable Court:

I. Issue an Order to Show Cause why the Oakland County Concealed Weapon Licensing Board

should not issue him a "general" license to carry a concealed pistol.

II. Hold an Evidentiary Hearing hereon in order to determine the true facts and law of this cause.

III. After said Hearing, direct the Defendant to issue him said "general" license to carry a concealed pistol.

IV. Direct Defendant to pay his attorneys fees and costs, so wrongfully incurred.

V. Such other relief as law and equity shall require.

Respectfully Submitted,

/s/ HUGH M. DAVIS, JR., P.C.
Attorney for Plaintiff
3975 City National Bank Building
Detroit, Michigan 48226
(313) 961-2255

DATED: _____

PETITION FOR JUDICIAL REVIEW

(Dated December 10, 1982)

Now comes Petitioner, Lawrence Joseph, by and through his attorneys, Hugh M. Davis, Jr., P.C., and states as follows: Pursuant to MCLA 24.303; MSA 3.560 (203), Petitioner files for Judicial Review of Respondent's Decision and states in support the following:

1. On October 13, 1982 after conducting a Hearing, the Oakland County Concealed Weapons Licensing Board denied re-issuance of a general concealed weapon permit to Petitioner, Lawrence Joseph.

2. The decision of the Oakland County Concealed Weapons Licensing Board was an agency decision within

the meaning of the Michigan Administrative Procedures Act.

3. Chapter Six of the Administrative Procedures Act of 1969 governs judicial review proceedings of agency decisions in the absence or inadequacy of any applicable statutory review proceeding in any Court specified by Statute in accordance with the General Court Rules. MCLA 24. 301-24.306; MSA 3.560(201-206).

4. "A petition for review shall be filed in the Circuit Court of the County where petitioner resides or has his principal place of business in this State, or in the Circuit Court for Ingham County." MCLA 24.303; MSA 3.560(203).

5. "A petition for review shall contain a concise statement of:

   (a) The nature of the proceedings as to which review is sought.
   (b) The facts on which venue is based.
   (c) The grounds on which relief is sought.
   (d) The relief sought." MCLA 24.303; MSA 3. 560(203).

6. Attached to this Petition and incorporated herein by reference, is Petitioner's Statement of Facts which states why this Honorable Court should grant Petitioner's request to overturn Respondent's Decision and a Memorandum of Law in Support thereof.

7. Attached to this Petition and incorporated therein by reference is a copy of Respondent's Decision.

8. Petitioner is currently a resident of Oakland County. Venue is properly established in this Court under MCLA 24.303; MSA 3.560(203).

9. Respondent is a State Administrative Agency within the meaning of MCLA 24.203; MSA 3.560(203), and has its principal offices in Pontiac, Michigan.

10. Respondent's Decision was:

(a) In violation of the Constitution and compiled laws of this State;
(b) In excess of the statutory authority or jurisdiction of the agency;
(c) Made upon unlawful procedure resulting in material prejudice to a party;
(d) Not supported by competent, material and substantial evidence on the whole record;
(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion;
(f) Affected by other substantial and material error of law;

within the meaning of MCLA 24.306; MSA 3.560(206).

11. Pursuant to MCLA 24.304; MSA 3.560(204), Petitioner demands his right to Oral Arguments.

WHEREFORE, Petitioner requests this Honorable Court to reverse the clearly erroneous and arbitrary decision of the Respondent; to Order Respondent to re-issue Petitioner a general concealed weapon permit or in the alternative, Order Respondent to conduct a Rehearing in this matter.

Respectfully Submitted,

/s/ HUGH M. DAVIS, JR., P.C.
Attorneys for Plaintiff
3975 City National Bank Building
Detroit, Michigan 48226
(313) 961-2255

DATED: 12-10-82

MEMORANDUM OF LAW

(Filed November 30, 1983)

QUESTION

I

WAS THE OAKLAND COUNTY CONCEALED WEAPON'S LICENSING BOARD IN ERROR IN DENYING PLAINTIFF A GENERAL CONCEALED WEAPON'S PERMIT?

Plaintiff states "YES"
Defendant states "NO"

MSA 3.560(206) provides for review of an agency decision pursuant to the Administrative Procedures Act. Section (d) provides that a court may "set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is not supported by competent, material and substantial evidence on the whole record."

The record in this case consists solely of a transcript of a hearing dated October 13, 1982. At page 37 of the transcript of the Oakland County Concealed Weapon's Licensing Board, the agency decided not to grant a general permit to carry a concealed weapon to the Plaintiff but rather granted a restricted permit. The agency stated in clear and unequivocal terms its reasons for not granting a general permit. The agency at page 38 even stated that the Board would consider amending the restricted permit to add additional activities if the Plaintiff would supply the Board with additional information.

At page 38 and 39 of the trial transcript, the Oakland County Concealed Weapon's Licensing Board set forth under what conditions the Board would grant a general permit. The Board did not feel that Mr. Joseph met the conditions to receive a general permit.

The standards to be used on appeal of an administrative decision is set forth in *Smith* v *Mayor of the City of Ecorse*, 81 Mich App 601, (1978). The court stated that the judicial yardstick for assessing the validity of an administrative decision is whether the decision is supported by competent, material and substantial evidence on the whole record. The court in *Union Bank and Trust Co.* v *First Michigan Bank & Trust Co.*, 44 Mich App 83 (1972), states that "In determining questions such as here presented to the trial court and now presented in this appeal to this court, neither court should superimpose its judgment over that of the commission and review questions of fact and weigh evidence, nor determine whether the probabilities preponderate one way or another, but such appeals simply determine whether the evidence is such as justifies the findings of the commission."

In the instant case, Mr. Joseph appealed to the Oakland County Concealed Weapon's Board because of his denial of a general permit to carry a concealed weapon. Mr. Joseph was the only person to testify in this cause and he was examined both by his attorney and by the Board itself. The Board determined that Mr. Joseph's activities did not necessitate his unlimited right to carry a concealed weapon but restricted his license to the business of "Market Square", a business owned by the Plaintiff, and also to hunting and target. It was the Board's opinion that it would not grant any further relief unless it was supplied with additional information which it requested at its October 13 hearing. No new or additional information has been supplied to the Board and for that reason the decision of the Oakland County Concealed Weapon's Licensing Board should remain in effect.

WHEREFORE, Defendant prays that the above-entitled action be dismissed for failure to state a claim upon which relief can be granted.

OAKLAND COUNTY CORPORATION COUNSEL
BY: Donald F. Slavin, Assistant
1200 N. Telegraph Road
Pontiac, Michigan 48053
Telephone: 858-0554

Dated: November 29, 1983

MOTION FILED
DEC 1 1986

IN THE SUPREME COURT OF THE UNITED STATES

Case No. 86-806

LAWRENCE E. JOSEPH AND R. FRANK JOSEPH,

Respondents,

v

L. BROOKS PATTERSON, RICHARD THOMPSON, DAVID CASE, individually and in their capacities as Oakland County Prosecutors; JAMES A'HEARN and ROBERT LEON, individually and in their capacities as members of the Oakland County Prosecutor Office Investigation Division and/or of the Oakland County Organized Crime Strike Force; Jointly and Severally,

Petitioners.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

BRIEF OF AMICUS CURIAE

WAYNE COUNTY PROSECUTOR'S OFFICE

TIMOTHY A. BAUGHMAN P24381 *
Chief of the Criminal Division
Research, Training and Appeals

DON W. ATKINS--P23147
Assistant Prosecuting Attorney
on behalf of the Prosecuting
Attorneys Association of
Michigan, as Amicus Curiae
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(313) 224-5748

* Counsel of Record

IN THE SUPREME COURT OF THE UNITED STATES

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Petitioners.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

NOW COMES The Prosecuting Attorneys Association of Michigan through John D. O'Hair, Prosecuting Attorney for the County of Wayne; Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals and Don W. Atkins, Assistant Prosecuting Attorney and makes this motion for leave to file brief as

amicus curiae, pursuant to Rule 36, stating in support thereof the following:

1. The Prosecuting Attorneys Association of Michigan is a special purpose organization which represents the interests and concerns of all county prosecuting attorneys in the State of Michigan with respect to the development of the criminal law.

2. The Prosecuting Attorneys Association of Michigan supports the position of the Petitioners in this cause. This Association sought written consent of the parties to file a brief as amicus curiae in this cause. While counsel for the Petitioners, Ms. Janice G. Hildenbrand, was and remains willing to consent to this request, your movant was informed on December 8, 1986 that counsel for the Respondents, Mr. Hugh M. Davis, Jr., has refused to consent to

this Association's request to file a brief as amicus curiae (See attached affidavit of Janice G. Hildenbrand).

3. The issues raised by the petition for a writ of certiorari in this matter are of paramount interest to all members of the Association since they touch upon the basic and fundamental duties of the office of prosecuting attorney as well as their ability to enforce the criminal laws of the State.

4. In Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), this Court held only that a prosecutor is immune from a civil suit for damages under 42 U.S.C. 1983 in "initiating a prosecution and in presenting the State's case". "Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence.

At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them ." 424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33, 47 L.Ed.2d at 144 n. 33. In the ten years since Imbler, this Court has not addressed the issue which is presented in the instant petition; namely, to what extent is a prosecutor immune from suit for actions which are taken prior to the filing of criminal charges?

5. Your movant believes that the accompanying proposed brief as amicus curiae sets forth in greater detail the reasons which support the contention that state prosecuting attorneys are entitled to the cloak of absolute immunity when

they are discharging the duties which they are required to undertake in determining whether to bring criminal charges.

6. The ability to conduct interviews of witnesses prior to decision of whether to initiate a criminal prosecution and the opportunity to assist police agencies in the drafting and preparation of search warrants prior to the initiation of criminal proceedings must not be hampered by the cloud of potential civil liability. Such activities are an integral part of the process of "initiating a prosecution". To deny such protection will only inhibit the fair and effective enforcement of the criminal laws and "foster uninformed decision-making".

7. The authorities relied upon by your movant clearly support this

proposition and reveal that a vast number of state and federal courts which have considered this issue subsequent to Imbler have either adopted or urged the adoption of a rule of absolute immunity for the type of pre-charging activities which have occurred in the instant matter.

8. Your movant believes that the accompanying brief will be of substantial benefit to this Court in its determination of whether to grant the Petition for a Writ of Certiorari which your movant urges this Court to do.

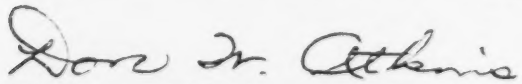
RELIEF

WHEREFORE, The Prosecuting Attorneys Association of Michigan, as Amicus Curiae, requests this Honorable Court to grant this motion for leave to file brief as Amicus Curiae in support of the Petition for a Writ of Certiorari filed by the Petitioners in this matter.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of the Criminal Division
Research, Training and Appeals



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DWA:dh

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INTEREST OF THE AMICUS CURIAE

The Prosecuting Attorneys Association of Michigan is a special purpose organization which represents the interests and concerns of all county prosecuting attorneys in the State of Michigan with respect to the development of the criminal law. The issues raised by the petition for a writ of certiorari in this matter are of paramount interest to all members of the Association since they touch upon the basic and fundamental duties of the office of prosecuting attorney as well as their ability to enforce the criminal laws of the State. It is, therefore, respectfully urged that the petition be granted.

ARGUMENT

A STATE PROSECUTING ATTORNEY IS ENTITLED TO ABSOLUTE IMMUNITY FROM CLAIMS ARISING UNDER 42 U.S.C. 1983 WHERE ALL ACTIONS TAKEN BY HIM WERE WITHIN THE AUTHORITY AND DUTIES OF HIS OFFICE AND WERE INTIMATELY RELATED TO AND INSEPARABLE FROM THE DECISION TO INITIATE A CRIMINAL PROSECUTION.

Both federal and state courts have held repeatedly that a prosecuting attorney is cloaked with absolute or "quasi-judicial" immunity for any and all acts performed within the scope of his authority and jurisdiction.

In Thompson v. Heither, 235 F.2d 176 (6th Cir. 1956), the plaintiff brought a civil rights action alleging false arrest, malicious prosecution and

conspiracy in bringing about his arrest and prosecution against a number of police officers, a Recorder's Court Judge, the Wayne County Prosecuting Attorney and his chief assistant. In sustaining the lower court's dismissal of the action, the Sixth Circuit Court of Appeals made the following pertinent observation (235 F.2d at 177):

> "...[J]udges and prosecutors, in cases where there is jurisdiction over the persons of defendants and over the offenses for which they are tried, come within the doctrine of judicial immunity by an important series of cases in the Supreme Court of the United States and other courts."

In Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), the court summarized the reasons which required that a prosecuting

attorney be granted the same immunity as is afforded members of the judiciary (361 F.2d at 590):

> "...[H]is primary responsibility is essentially judicial - the prosecution of the guilty and the protection of the innocent, Griffin v United States, 295 F 437, 439-440 (CA 3, 1924); his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. This reasoning is nearly as well established in Anglo-American law as judicial immunity itself." (Footnote omitted).

This recognition of the prosecuting

attorney's status has not been overlooked by this Court. Quite to the contrary, it has re-affirmed the proposition. In Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), the plaintiff had been convicted of murder and later succeeded in obtaining his release from state prison through federal habeas corpus proceedings. Thereafter, he brought an action under 42 U.S.C. 1983 against the prosecutors and others involved in the prosecution that led to his conviction. The plaintiff alleged that the prosecutor had knowingly used false testimony and suppressed material evidence at his trial.

The majority opinion in Imbler addressed the underlying policy considerations for absolute prosecutorial immunity from civil liability at common law to buttress the conclusion that a prosecutor enjoys the same absolute immunity in actions

brought against them under 42 U.S.C. 1983 (424 U.S. at 422-424, 96 S.Ct. at 991-992, 47 L.Ed.2d at 139-140):

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. One court expressed both considerations as follows:
>
> > The office of public prosecutor is one which must be administered with courage and indepen-

dence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction.

There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case ... The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which

> should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement." Pearson v Reed, 6 Cal App 2d 277, 287, 44 P2d 592, 597 (1935).

In accordance with its decision in Imbler, this Court in Williams v. Hilliard, 424 U.S. 961, 96 S.Ct. 1453, 47 L.Ed.2d 729 (1976) vacated the decision of the Court of Appeals in 516 F.2d 1344 (6th Cir. 1975) which had held that a state prosecutor was liable for civil damages when his actions and omissions deprived a former state defendant of her constitutional rights to a fair trial. On remand [540 F.2d 220 (6th Cir. 1976)], the Court of Appeals adhered to the

principle that a state prosecutor is absolutely immune for acts and/or ommissions within the scope of his duties even where the prosecutor knowingly uses perjured testimony, deliberately withholds exculpatory information or fails to make disclosure of all facts which may cast doubt upon the testimony elicited in the state's case.

This rule of absolute immunity is no different in Michigan. In Belt v. Ritter, 385 Mich. 402, 189 N.W.2d 221 (1971), the Michigan Supreme Court recognized that the immunity of the judiciary had been extended to prosecuting attorneys on the theory that they act in a quasi-judicial capacity. In Bloss v. Williams, 15 Mich.App. 228, 166 N.W.2d 520 (1968), the court noted that the prosecuting attorney's status as a quasi-judicial officer has existed at least since 1883, citing the case of

People v. Bemis, 51 Mich.422 (1883).

In finding that a prosecutor is absolutely immune from claims of defamation for statements made during the course of his prosecutorial duties, the Michigan Court of Appeals in Payton v. Wayne County, 137 Mich.App. 361, 357 N.W.2d 700 (1984) re-affirmed the rule of absolute immunity and cited with approval the case of Davis v. Eddie, 130 Mich.App. 284, 343 N.W.2d 11 (1983) (137 Mich.App. at 370- 371):

> While Davis involved a claim of false arrest and imprisonment rather than defamation as a result of a press release, this Court stated that "[w]here a prosecutor's actions are within the scope of his prosecutorial functions and duties, his acts are quasi-judicial in nature and he has absolute immunity

regarding the performance of those functions and duties". Davis, p 286. In reaching this conclusion, the Davis Court relied upon the following observation from Bloss v Williams, 15 Mich App 228; 166 NW2d 520 (1968):

> "'The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions ***.' Citing Yaselli v Goff, 12 F2d 396, 406 (CA 2, 1926)." Davis, supra, pp 286-287.

The Davis Court also noted that the duties and functions of a prose-

cutor are not strictly or narrowly construed, again citing the following passage from Bloss:

> "'The prosecutor's powers and duties include not only those expressly set forth in the statute but also such additional functions as may be necessarily implied from those specifically mentioned.' Bloss, supra, p 233, citing 27 CJS District and Prosecuting Attor- neys, Sec. 10." Davis, supra, p 287.

Thus, Michigan law also favors the Imbler policy of protecting the prosecutor's independence of judgment from harassment due to the constant threat of potential litigation.

As the above-cited cases clearly indicate, the discretionary decision whether to charge and whether to continue a prosecution of a specific case lays at the very heart of the prosecutorial function. Commensurate with this duty is the need to gather sufficient information in order to render an informed decision on the paramount question of whether to initiate criminal proceedings. It is the epitome of the role of the prosecuting attorney.

In Imbler, this Court was fully cognizant of the role which effective preparation played in the process of determining whether to "initiate" a criminal prosecution (424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33, 47 L.Ed.2d at 144 n. 33):

> We recognize that the duties of the prosecutor in his role as an

advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. ... These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. ... (emphasis added)

It was evident in Imbler that the question of drawing "...a proper line..." between a prosecutor's administrative functions and those which are "...intimately associated with the judicial phase of the criminal process..." was not properly before this Court. See e.g. Pembaur v. City of Cincinnati, 475 U.S. ___ n. 2, 106 S.Ct. 1292, 1295 n. 2, 89 L.Ed.2d 452, 459 n. 2 (1986). However, the instant case does present this Court with the appropriate opportunity to address this vital, and yet unresolved, issue.

A. INTERVIEWING WITNESSES PRIOR TO INITIATING PROSECUTION.

Subsequent to Imbler, various courts have isolated the conduct complained of, analyzed the functional nature of the questioned activity and thereafter attached the appropriate label to the role played by the prosecutor within the

context of the case. In interpreting the Imbler decision, it became readily apparent that not all prosecutorial duties that are performed outside the confines of a court of law would be entitled only to qualified good-faith immunity. Thus, in Cook v. Houston Post, 616 F.2d 791 (5th Cir. 1980) the court opined that in the customary course of preparing a criminal prosecution it is necessary that the prosecutor interview witnesses and conduct his own factual investigation. These activities are an integral part of the prosecutorial function and, as such, are cloaked with absolute immunity (616 F.2d at 793):

This Court, in interpreting Imbler, has extended prosecutorial immunity to a prosecutor's actions in initiating, investigating and pursuing a criminal prosecution. Henzel v. Gerstein, 608 F2d 654 (5th Cir. 1979); Connor v. Pickett, 552 F2d 585 (5th Cir. 1976). The

specific acts complained of here were clearly within the Imbler shelter.

> Collins would have been negligent in his duties as a prosecutor had he not interviewed witnesses before presenting their testimony to the Grand Jury. His duties as a prosecutor required him to obtain, examine and interpret documents. As Judge Cowan correctly pointed out in his Order Granting Summary Judgment,
>
> > "Not all of an advocate's work is done in the courtroom. For a lawyer to properly try a case, he must confer with witnesses, and conduct some of his own factual investigation."

Similar observations had been made by the Third Circuit Court of Appeals in

Forsyth v. Kleindienst, 599 F.2d 1203 (3rd Cir. 1979), aff'd in part, rev'd in part sub nom Mitchell v. Forsyth, 472 U.S. ___, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) wherein the court noted as follows (599 F.2d at 1215):

> We recognize that the decision of the Attorney General, or a prosecuting attorney, to initiate a prosecution is not made in a vacuum. On occasion, the securing of additional information may be necessary before an informed decision can be made. To grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decisionmaking and the potential for needless

> actions. We believe that the right to make the decision without being subject to suit must include some limited right to gather necessary infomation. At the same time, we are sensitive to the possibility that this narrow exception could be distorted to include all of a prosecutor's investigative activities. We hold only that to the extent that the securing of information is necessary to a prosecutor's decision to initiate a criminal prosecution, it is encompassed within the protected, quasi-judicial immunity afforded to the decision itself. (emphasis added)

In the instant matter, all events which were germane to the criminal prosecution occurred on the same day. In the early morning hours of March 14,

1980, an altercation took place between George Joseph, a younger brother of the plaintiffs, and the complaining witness, Hal Morrow. This resulted in charges of felonious assault and extortion being filed against George Joseph. A short time later, Morrow was contacted by the plaintiffs and offered a sum of money if he would agree to drop these criminal charges.

From mid- to late morning on March 14, 1980, local police officers contacted the Oakland County Prosecutor's Office and requested assistance regarding the filing of possible criminal charges against the plaintiffs. By mid-afternoon, following Chief Assistant Prosecutor Thompson's interview of Morrow, a criminal complaint, arrest warrant and search warrant (to secure the receipt which Morrow had signed for the money which he received from the plaintiffs) were sought

before a state judge. The criminal complaint and both warrants were issued at the same hearing on the afternoon of March 14th and the search and arrest warrants were executed that afternoon.

It is abundantly clear from the present record that all of the prosecutor's activities, including his interview of the complaining witness, occurred in such a close temporal proximity that they were inextricably intertwined with the initiation of the criminal prosecution. Nevertheless, the majority of the Court below opined that remand was necessary "...to determine the nature and intent of the interview..." because "...there are allegations which could support a finding that Thompson acted in an investigative capacity during the interview..." (795 F.2d at 555).

Judge Nelson, in his dissenting

opinion, noted that the joint pretrial statement filed in District Court which characterized the plaintiffs' claims failed to make any reference to the interrogation of Hal Morrow. Judge Nelson added that, even if the issue had properly been preserved, the Morrow interview must be considered to be an integral part of the process of "initiating a prosecution" (795 F.2d at 562):

> "Clearly," as this court says in Part III C of its opinion, "decisions of when and how to prosecute are not made in a vacuum, so that in some cases the directing of police to secure further evidence may be necessary to and part of a decision to prosecute." It seems to me that the interrogation of Morrow, which dealt with facts critical to the

> prosecution of Lawrence and Frank Joseph and which took place on the very day the prosecution was initiated, was so clearly an integral part of the initiation of the prosecution that further factfinding would be pointless.

In a remarkably similar case involving a prosecuting attorney's liability for his "pre-charging" activities, the court in Schieb v. Humane Soc. of Huron Valley, 582 F.Supp. 717 (E.D.Mich.1984) held that state prosecutors were absolutely immune from civil rights suit for allegedly conspiring with police to entrap defendants during an investigation of suspected dogfighting. Therein, a county prosecuting attorney consulted with various law enforcement officials during the course of an investigation to uncover suspected violations of state law regarding dogfighting. The court found

that any pre-charging activities of the prosecutor were covered by the umbrella of absolute immunity since "...the obvious purpose of which is to inform the decision of the prosecutor whether or not to institute criminal proceedings..." (582 F.Supp. at 723). In order to clarify its decision, the District Court conducted the following analysis of the standard which it believed was appropriate (582 F.Supp. at 724):

> The Imbler Court focused its attention upon the prosecutor's decision to bring charges or not, and the conduct of a criminal prosecution once the charges were brought. Several decisions from the Courts of Appeal have recognized that a rigid distinction between advocacy and investigative functions was impractical and somewhat disingenuous, inasmuch as

EDITOR'S NOTE

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those functions are inextricably intertwined in the mind of the prosecutor. This Court believes that a further dissection of investigative activities between "pre-decision to charge" and "post-decision to charge", or "pre-selection of a target" and "post-selection of a target" is equally unwise. Fair and effective enforcement of the criminal laws is furthered by encouraging the prosecutor to explore, as fully as possible, all available sources of information prior to making a determination about whether to proceed to prosecution, to refrain from prosecution, or to dismiss a prosecution improvidently brought. The rules that govern the prosecutor's conduct, including the rules that govern his/her amen-

ability to a civil suit for damages, should be structured in such a way as to encourage the fullest exploration of relevant facts prior to making the decision to charge.

* * *

Any activity which occurs prior to the bringing of criminal charges, the obvious purpose of which is to inform the decision of whether or not to charge, would be protected. Thus, such activities as interviewing witnesses, consulting with police, or even as here, taking part in the formulation of an operation to ascertain the identity of persons inclined to violate the criminal laws have as their obvious purpose the accumulation of information concerning the potential criminal liability of

> suspects. The prosecutor must be free to engage in this kind of activity if he is to faithfully discharge his duty to vigorously enforce the criminal laws. (emphasis added)

Courts of Appeal in the Ninth and Tenth Circuits have similarly adopted the reasoning espoused by the court in Schieb; namely, that absolute immunity applies to the activities of a prosecuting attorney in the necessary investigation and preparation which must precede the decision to initiate a criminal prosecution. Olagues v. Russoniello, 770 F.2d 791 (9th Cir. 1985); Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984); Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675 (9th Cir. 1984); Freeman on Behalf of the Sanctuary v. Hittle, 708 F.2d 442 (9th Cir. 1983); Atkins v. Lanning, 556

F.2d 485 (10th Cir. 1977). See also: Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980); Chicopee Lions Club v. District Attorney, 396 Mass. 244, 485 N.E.2d 673 (1985).

It is respectfully urged that such an analysis of the pre-charging activities of a prosecuting attorney be adopted by this Court. Such an approach will provide prosecuting attorneys with the protection necessary to prosecute to the fullest possible degree violations of the criminal law without fear of being subjected to potential liability based upon claimed civil rights violations.

B. ISSUANCE OF SEARCH WARRANTS.

Immediately after having determined that the prosecuting attorneys in the instant matter were entitled to absolute immunity for obtaining the issuance of criminal complaints and arrest warrants

against the Josephs (795 F.2d at 555-556), the Court held that a further factual inquiry was required to determine whether the actions of the prosecutors in seeking the issuance of a search warrant at the same time they filed the complaint and requested arrest warrants was merely an investigative function and, thus, not entitled to the shield of absolute immunity (795 F.2d at 556).

As aptly pointed out by Judge Nelson in his dissenting opinion (795 F.2d at 561):

> If any prosecutor was peripherally involved in obtaining the search warrant, I see no basis for distinguishing his conduct from the obtaining of the arrest warrants, which Part III B of the court's opinion holds is protected, without

further inquiry, by absolute immunity.

Judge Nelson also noted that counsel for the Josephs conceded, before the District Court, that actions taken merely to request the issuance of arrest and search warrants could fall within the prosecutor's "quasi-judicial" function which is protected by absolute immunity (795 F.2d at 561).

As with the prosecutor's interview of the complaining witness in this case, the limited factual investigation which must precede any decision to initiate a criminal prosecution must include the ability to gather essential evidence. Frequently, the seizure of critical physical evidence can only be accomplished through the use of a search warrant. Without it, the initiation of many criminal prosecutions would not be

possible. Essential to this process is the need for full cooperation between prosecutors and law enforcement officers. In order to avoid the seizure of evidence which may later be declared to be inadmissible due to improper actions taken by the police and to protect the rights of the public from such potentially improper conduct, prosecuting attorneys must be permitted to advise and counsel law enforcement personnel in the gathering of such evidence which will be utilized in the decision of whether to initiate a criminal prosecution. The propriety of this approach was recognized by the court in Schieb v. Humane Soc. of Huron Valley, supra. Therein, District Judge Joiner succinctly stated the rationale to support this approach as follows (582 F.Supp. at 723):

> ... (T)he giving of legal advice to police and other persons engaged

in the business of law enforcement is a task which the prosecutor is best situated to undertake, given his legal training and his formal ties with the police. Because there is a strong public policy encourageing the prosecutor to give such legal advice to police engaged in new and potentially problematic methods of law enforcement, without the fear that such counseling will later impose upon the prosecutor the hardship of being hailed into court as a defendant in a civil case, the Court concludes that such activity is the kind which should be protected by absolute immunity, in furtherance of the policies underlying Imbler and its progeny.

Throughout Michigan, law enforcement agencies rely upon prosecutors for aid and guidance in assembling a case for

prosecution. Indeed, they are encouraged to do so in order to avoid the possibility that the methods which they employ in gathering evidence do not run afoul of constitutional and legal principles. For example, in Wayne County, all local police agencies are directed to obtain the approval of the Prosecutor's Office before seeking the issuance of a search warrant from a court of competent jurisdiction. Such a procedure helps ensure the validity of the warrant by screening out those requests which are not founded upon probable cause and by correcting those requests which may contain a fatal flaw. It cannot be seriously argued that such an approach does not serve a vital function in effective law enforcement. However, should the decision in the instant matter be permitted to stand, prosecuting attorneys would be ill-advised to continue such a practice

and thereby face the very real threat of being "...hailed into court as a defendant in a civil case".

It would appear that federal prosecutors enjoy a greater degree of immunity under similar circumstances than state prosecutors do. In upholding a federal prosecutor's claim of immunity, the court in Krohn v. United States, 742 F.2d 24 (1st Cir. 1984) noted as follows (742 F.2d at 30):

> Federal prosecutors must investigate as well as prosecute, as evidenced by their express authority to request search warrants. See F.R.Crim.P. 41(a); cf. Imbler v. Pachtman, 424 U.S. 409, 430-431, 96 S.Ct. 984, 994-95, 47 L.Ed.2d 128 (1976). They must enjoy broad discretion as to the means employed. FBI agents, of

> course, are given explicit authority to investigate and seize. See 18 U.S.C. 3052, 3107. Here Brown (the federal prosecutor) and the other officials clearly were acting in their investigative capacity.

It is respectfully urged that state prosecuting attorneys must also be accorded absolute immunity when counseling law enforcement agencies and when seeking the issuance of search warrants. To permit the decision of the Court of Appeals to stand will needlessly expose prosecutors to the continuing threat of civil litigation and will "...foster uninformed decisionmaking and the potential for needless actions." Forsyth v. Kleindienst, 599 F.2d at 1215.

SUMMARY OF ARGUMENT

In Imbler v. Pachtman, this Court held only that a prosecutor is immune from a civil suit for damages under 42 U.S.C. 1983 in "initiating a prosecution and in presenting the State's case". "Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them ." 424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33, 47 L.Ed.2d at 144 n. 33. In the ten years since Imbler, this Court has not addressed the issue which is presented in the instant petition; namely, to what

extent is a prosecutor immune from suit for actions which are taken prior to the filing of criminal charges?

The ability to conduct interviews of witnesses prior to decision of whether to initiate a criminal prosecution and the opportunity to assist police agencies in the drafting and preparation of search warrants prior to the initiation of criminal proceedings must not be hampered by the cloud of potential civil liability. Such activities are an integral part of the process of "initiating a prosecution". To deny such protection will only inhibit the fair and effective enforcement of the criminal laws and "foster uninformed decision-making".

CONCLUSION

WHEREFORE, The Prosecuting Attorneys Association of Michigan, as Amicus Curiae, requests this Honorable Court to grant the petition for a writ of certiorari filed by the Petitioners in this matter.

Respectfully submitted,

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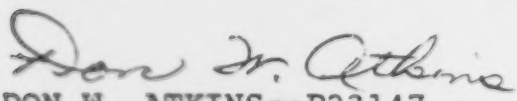

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Case No. 86-806

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LAWRENCE E. JOSEPH, and
E. FRANK JOSEPH,
Respondents,

v

L. BROOKS PATTERSON, RICHARD THOMPSON, DAVID CASE, individually and in their capacities as Oakland County Prosecutors; JAMES A'HEARN and ROBERT LEON, individually and in their capacities as members of the Oakland County Prosecutor Office Investigation Division and/or of the Oakland County Organized Crime Strike Force; Jointly and Severally,
Petitioners.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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OCTOBER TERM, 1986

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STATEMENT OF THE CASE

As early as 1978, Defendant James A'Hearn, formerly a City of Birmingham police officer and presently Chief of the Oakland County Prosecutor's Investigative Division (Organized Crime Strike Force) began to approach third parties seeking information about Plaintiffs and their family, indicating Defendant A'Hearn's belief that Plaintiffs were associated with the "Mafia" and indicating that he wanted to "get" the Josephs. Defendant Richard Thompson, Chief Assistant to the Oakland County Prosecutor (Defendant L. Brooks Patterson) expressed the same sentiments to various third parties during the same period of time.

On March 14, 1980, using a minor altercation in which George Joseph, a younger brother of Plaintiffs herein, was involved with one Hal Morrow, the Prosecutor's Office entered into concerted action with

the City of Birmingham Police Department to bring criminal charges against Plaintiffs herein for "obstruction of justice" and "compounding a felony". The charges were based on the false claim that an otherwise legal and proper release of civil liability, obtained by Plaintiffs from Morrow, was in fact an attempt to obstruct justice and obtain the withdrawal of a criminal complaint against Plaintiffs' younger brother.

In pursuit of their objective, Defendant Prosecutors:

1. Caused private telephone conversations of Plaintiffs to be recorded by Morrow without Plaintiffs' knowledge in violation of Michigan law.

2. Directed Morrow to "play along" with Plaintiffs in an attempt to entrap Plaintiffs into some illegal activity.

3. Coerced Morrow into being a witness against Plaintiffs by threatening to pro-

secute Morrow himself if he attempted to withdraw his criminal complaint against the younger brother or refused to testify in the manufactured criminal proceedings against Plaintiffs.

4. Coerced Morrow by denying Morrow his right to consult with an attorney after a specific request (this was in a tape recorded session).

5. Coerced so-called "inculpatory" statements about Plaintiffs from Morrow.

Having forced Morrow into making false statements which might arguably support the issuance of a complaint and warrant against Plaintiffs, Defendant Prosecutors and their investigators deliberately ignored and refused to honor a properly issued writ of habeas corpus issued by the Honorable Augustus Cifelli of the 48th District Court, State of Michigan. Defendants' refusal was based on the false belief that Plaintiffs were in some fashion

"related" to Judge Cifelli. Defendant Prosecutor Thompson admittedly ordered the Chief of the Birmingham Police Department to ignore the writ of habeas corpus and instead transport the younger brother of Plaintiffs to another Judge in the same County to avoid any arraignment in front of "Uncle Gus".

Thereafter, by falsly swearing before an Oakland County Circuit Judge that said Judge was the only one available to act, Defendants wrongfully obtained the arraignment of the younger brother on an incarcerative bond, obtained arrest warrants for the Plaintiffs herein and obtained a search warrant for Plaintiff Lawrence Joseph's place of business, a supermarket. The falsely sworn basis for the search warrant was the ostensible need to recover the civil release which the Prosecutor claimed was the basis of an attempt to obstruct justice.

BEST AVA

Under the direction of Defendants, the search warrant was executed during business hours, but while Plaintiff Lawrence Joseph was being detained on the falsely sworn arrest warrant. The search was conducted in such a manner as to harass and terrify the employees and customers of Plaintiff Lawrence Joseph, to disrupt and damage his business premises and to extend into areas not authorized by said warrant and for purposes not envisaged within said warrant.

These specific allegations are not denied by Defendants and it is in fact admitted that at least a half dozen people participated in the search of the basement of the business premises attempting to find stolen liquor and cigarettes. They later falsely instigated an administrative investigation of the same allegations, even after no such contraband or untaxed goods were found.

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In addition to directing the destructive and overly extensive search of Plaintiff Lawrence Joseph's business premises based on a falsely sworn warrant, Defendants also caused the restaurant of Plaintiff R. Frank Joseph to be invaded without cause or legal process. There they arrested one of the Joseph sisters for no cause whatsoever, save to harm the restaurant business and illegally detain Plaintiffs' relatives.

After the events described above, all of which occurred on March 14, 1980, Defendants instituted and falsely maintained a malicious prosecution of Plaintiffs herein for "obstruction of justice" and "compounding a felony". The charges were dismissed at a preliminary examination by the District Court Judge and Defendants appealed said dismissal to the Oakland County Circuit Court, where the dismissal was upheld. Thereafter, Defendants appealed

the dismissal to the Michigan State Court of Appeals, where the dismissals were again upheld. No charges were ever lodged against the detained sister.

Even after the dismissal of the criminal charges was upheld by the Court of Appeals in Michigan, Defendants herein continued to oppose the expungement of Plaintiffs' criminal records and the return of their photographs and fingerprint cards at the trial court level.

The felonious assault charge against the younger brother, George Joseph, which the witness Morrow pursued under threat of prosecution by Defendants, was ultimately dismissed.

After the events referred to on March 14, 1980, Defendant Thompson sought to utilize his authority as Chief Assistant Prosecutor of Oakland County to deny Plaintiff Lawrence Joseph a renewal of his permit to carry a concealed weapon, which

permit had been continuously held by Plaintiff Lawrence Joseph more than twelve years. Defendant Thompson ordered Defendant Case, an Assistant Oakland County Prosecutor who sat as the only permanent member of the Oakland County Concealed Weapons Licensing Board, to investigate why Plaintiff Lawrence Joseph possessed a general concealed weapons permit and to deny a renewal of that permit at the regularly appointed renewal date of July, 1982. It has been proven that Defendant Case in fact used his position as the Oakland County Prosecutor's permanent designee to said Board to "flag" Plaintiff Lawrence Joseph's concealed weapons licensing file. In August, 1982, Defendant Case did in fact induce said Concealed Weapons Licensing Board to reduce Plaintiff Lawrence Joseph's concealed weapons permit from a general permit to a restricted permit.

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However, the actions of the Prosecutor were so unusual in the case that Captain Billy Nolin, who respresented the Oakland County Sheriff on the Board, reported the "flagging" and brought about its exposure.

Plaintiff Lawrence Joseph appealed the administrative decision and the Oakland County Circuit Court ruled on March 7, 1984 (after the dismissal of the instant case below) that the Concealed Weapons Licensing Board improperly and without any basis denied Plaintiff Lawlrence Joseph's request for renewal of his general concealed weapons permit. The Court further found that the actions of the Board violated Plaintiff Joseph's due process rights in the licensing procedure by selectively applying new and different standards and policies to Plaintiff Joseph without affording him any notice of said "change in standards" or any opportunity to meet or comply with them.

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Plaintiff Joseph contends that this entire episode with Concealed Weapons Licensing Board was an attempt by the Defendant to arrest, prosecute and convict him of a weapons violation. Such a conviction would lead to the revocation of his various liquor licenses, thereby forcing him out of his lawfully conducted supermarket business.

For the purpose of evaluating a Motion to Dismiss, the above facts must be regarded as true. Walker Process Equipment, Inc. v Food Machinery and Chemical Corp, 382 US 172 (1965). The claim should not be dismissed unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v Gibson. 355 US 41 (1957). The same presumptions should apply in determining whether petitioners here are entitled to absolute immunity.

However, the record in the trial court was not well developed and the decision of the Sixth Circuit below in substantial part called for a remand for a specific determination of facts.

This uncertain state of the record occurred because, on the day before trial, all Defendants related to the original codefendants from the City of Birmingham settled with Plaintiffs and the case against them was dismissed. On the day of trial, February 2, 1984, the Trial Court heard arguments for the first time on the Defendants' Motions for Summary Judgment based on prosecutorial immunity. Defendants Patterson, Thomson, Case, A'Hearn and Leon had filed the motions after the completion of discovery. The motions were not accompanied by affidavits. There was no extensive briefing or response by Plaintiffs. The District Court entered an oral opinion dismissing all federal claims

against the three prosecutors based on absolute immunity pursuant to Imbler v Pachtman, 424 US 409, 96 S Ct 984, 47 L Ed 2d 128 (1976). Although the Court did not explicitly extend the absolute immunity afforded to the prosecutors herein to the two investigators who were employed by the prosecutor's office, the trial court accomplished the same objective by dismissing all federal claims against said investigators based on the Court's unspecified finding of the insufficiency of the facts pled by Plaintiffs against them.

The Court's Order of Dismissal was entered on March 12, 1984. The Order did not specify the factual and legal basis on which the Court acted, save by adversion to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Neither did the Order of Dismissal distinguish between those Oakland County Defendants who were in fact attorneys and those who were investigators

employed by the prosecutor's office. Finally, the Order of Dismissal did not advert to or incorporate by reference any oral opinion or fact-finding by the Court.

REASONS FOR DENYING THE WRIT:

I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY DECIDED THE ISSUE OF THE SCOPE OF ABOSLUTE PROSECUTORIAL IMMUNITY WITHIN THE DICTATES OF IMBLER V PACHTMAN CONCERNING INVESTIGATIVE ACTIVITIES PRIOR TO THE BRINGING OF CHARGES AND, THERE BEING NO DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS IN OTHER CIRCUIT COURTS OF APPEAL, THERE IS NO NECESSITY FOR THIS COURT TO SETTLE ANY QUESTION RELATING THERETO.

The opinion of the Sixth Circuit below has thoughtfully and carefully addressed all of the issues raised by Petitioners herein, although the Sixth Circuit specifically found that "these facts are not well-developed in the record...." (App. A-21 Petition). The essential thrust of the Petition For Certiorari herein is to ask this Court to extend absolute prosecutorial immunity to all investigative activities engaged in by a prosecutor. Although lip service is paid to the issues of "quasi-judicial" versus "administrative or investigative" work, "advocatory" ver-

sus "non-advocatory" activity and "prior" versus "post" institution of criminal process activities, the conclusion which the Petition urges is that prosecutors should be absolutely immune from civil liability from any and all investigatory activity which either results in the initiation of criminal charges or might reasonably have so resulted.

Respondents suggest that this Court should decline to grant the Petition as presently postured. Respondents do not deny that the issue of prosecutorial immunity is an important one. Neither do they deny that certain questions were specifically left open by this Court's decision in Imbler v Pachtman, supra at 431. Further, Respondents do not deny that the District Courts and Circuit Courts of Appeal below have delineated the parameters of absolute prosecutorial immunity by ap-

plying differing tests and constructs over the decade that Imbler has been in force.

However, these circumstances alone do not make out a sufficient reason for granting the Petition pursuant to Rule 17 of this Court inasmuch as there does not appear to be any direct conflict between the decisions of the Courts of Appeal below. Rather, there seems only to be a multiplicity of approaches to the various factual situations which have arisen.

Consequently, the question before this Court is whether or not this case presents an opportunity to more rigorously define the limits of absolute prosecutorial immunity. Respondents suggest that the various opinions below do not conflict with each other and that the courts have been able to apply the dictates of Imbler with relative consistency. Further, Respondents suggest that the record in the instant case is not amenable in its present state

to a thoughtful and comprehensive consideration of the question.

It is helpful to quickly review the substantive holdings of the Sixth Circuit. On the issue of the prosecutor's investigatory interview with the witness Morrow, the opinion below distinguished between the investigative function and the decision to initiate prosecution. The Court below further distinguished between the investigative interviewing of witnesses and the interviewing of witnesses in preparation for the presentation of evidence at trial. Having set forth the competing policy concerns, the Court below found the record insufficient and remanded the case for further development in the District Court (Petition App. A-11 & 12).

Regarding the Plaintiffs' complaints of abuse of process, manipulation of the courts and false swearing in the seeking of the arrest warrants, the opinion below

surveyed the eight most relevant decisions in the lower courts since the decision in Imbler in 1976. Based on that review, the Court below specifically determined that the seeking of complaints and arrest warrants was clearly a part of the decision to institute a criminal prosecution and was therefore entitled to absolute immunity, regardless of the prosecutorial misconduct. (App. A-12 & 13)

Regarding the false swearing of applications for search warrants to be used as a pretext for invading Plaintiffs' businesses to pursue the investigation of unrelated, but suspected criminal activity, followed by the actual direction of and participation in the resultant search, the Court below followed the same thoughtful pattern, of surveying and construing the relevant post-Imbler decisions. The opinion below then adopted the reasoning of a long line of cases, both before and after

Imbler that these investigatory searches were not absolutely protected activity (Petition App. A-13 through A-15).

The prosecutorial activity of appealing the dismissal of the charges against the Respondents in state court was found to be absolutely immune (A-15). The issue of the Prosecutor's opposition to the expungement of Respondents' criminal record was found to be insufficiently developed and was remanded for futher determinations (A-19 through 21). The activities of the investigators in the prosecutor's office was held not to be absolutely immune inasmuch as they went beyond "ministerial actions intimately related to the judicial process pursuant to the express direction and control of the Prosecutor" (Petition App. A-21).

Petitioners cannot fairly characterize the careful and multi-faceted decision of the Sixth Circuit below to be clearly er-

roneous or to have substantially "departed from the accepted and usual course of judicial proceedings." Supreme Court Rule 17.1(a). Consequently, Petitioners are forced to characterize the decision below merely as an important one which should be settled by this Court. It should be noted that Petitioners cannot even point out any direct conflict between the decsion below and those of any other Circuit Court of Appeal.

Respondents do not believe that this case presents an opportunity for this Court to halt the thoughtful development of opinion on the limits of absolute prosecutorial immunity as it has proceeded since the Imbler decision. Respondents contend that the real thrust of this Petition is to press the proposition that all prosecutorial investigative activity is absolutely protected so long as it actually or might reasonably lead to criminal

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prosecution. To be sure, such a rule would eliminate the necessity for much of the careful balancing and thoughtful analysis demonstrated by the Sixth Circuit below. The Petitioners desire for such a prophylactic and categorical rule is natural and expedient. However, civil rights and constitutional liberties rarely fit comfortably on such a Procrustean bed.

Respondents suggest that the relative paucity of prosecutorial immunity cases in the decade since Imbler is an indication that this problem is not deeply troubling the courts and prosecutors of the land. Respondents have found no instance in which it has been alleged that prosecutorial resolve has been weakened by the spectre of civil liability.

Most of the post-Imbler cases which have considered the question of absolute immunity for prosecutorial investigative activities have used the "functional"

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test, i.e. - where the prosecutor performs functions traditionally and usually performed by policemen, then he is outside the ambit of his quasi-judicial role. Please see Hampton v Hanrahan, 600 F2d 600 (7th Cir 1979); Forsyth v Kleindienst, 599 F2d 1203 (3rd Cir 1979); Jacobson v Rose, 592 F2d 515 (9th Cir 1978); Marrero v City of Hialeah, 625 F2d 498 (5th Cir 1980); Helstoski v Goldstein, 552 F2d 564 (3rd Cir 1977); Higgs v Florey, 713 P2d 840 (Colo 1986); Rex v Teeples, 453 F2d 840 (1985); McSurely v McClellan, 697 F2d 309 (DC Cir 1982).

This approach has been criticized as narrow and mechanical in "Comment", Section 1983 and Prosecutorial Immunity, 19 Amer. Crim. L. Rev. 81 (1981). The "functional" approach was dissected, categorized and implicitly criticized in "Note", Supplementing the Functional Test of Pro-

secutorial Immunity, 34 Stan. L. Rev. 487 (1982).

The cases and the commentators have attempted to categorize or analyze prosecutorial misconduct in terms of the stage of the procedings at which it occurs. When is Prosecutor Entitled to Absolute Immunity from Civil Suit for Damages under 42 USCS Section 1983: Post-Imbler Cases, 67 ALR Fed. 640. The Second Circuit is said to have created the "harm" test in Lee v Willins, 617 F2d 320 (2nd Cir 1980) and Taylor v Kavanagh, 640 F2d 650 (2nd Cir 1981). The "harm" test ostensibly turns on the question of whether or not the harm suffered by the citizen arises independently of the judicial process. It arguably provides broader protection for the prosecutor than the "functional" test.

However, these varying approaches have generally been tailored to the specific factual situations before the courts be-

low. It cannot be said that there is a tendency to be protective of the prosecutor to the point of encouraging abuse of the office. Conversely, it cannot be said that the courts have been anxious to narrowly circumscribe absolute immunity and expose the prosecutor to numerous frivolous, vexatious proceedings. While Respondents do not put it beyond the ken of this Court to further fashion or refine the basic Imbler doctrine, there does not seem to be a compelling reason to do so.

Finally, Respondents point out that the immunization of all investigative activities which ultimately result in the initiation of criminal prosecutions opens the way toward two dangerous propositions. First, such an extension of absolute prosecutorial immunity will immediately focus attention on how far that immunity should be extended to investigators employed directly by the prosecutor's office, as op-

posed to the qualified immunity accorded other law enforcement officials. There have been some cursory decisions tending in that direction already. Please see Freeman v Hittle, 708 F2d 442 (9th Cir 1983) and Atkins v Lanning, 556 F2d 485 (10th Cir 1977). If the prosecutor's investigator is merely carrying out "ministerial acts" or acts which have been specifically directed by an absolutely immune prosecutor, one line of reasoning would indicate that the investigator should also be absolutely immune. Respondents contend that this is a dangerous path on which to embark.

Second, if the subsequent initiation of a criminal prosecution can operate to immunize post facto violations of civil liberties committed by prosecutors during the investigatory phase, the miscreant prosecutor will be encouraged to immunize his investigatory transgressions by bring-

ing unfounded charges. Again, Respondents suggest that the present case-by-case factual analysis which has been undertaken by the lower courts since Imbler is a wiser course.

II.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY HELD THAT PETITIONER CASE WAS NOT ENTITLED TO ABSOLUTE IMMUNITY AS A MEMBER OF THE OAKLAND COUNTY CONCEALED WEAPONS LICENSING BOARD.

The primary thrust of Petitioner Case's argument that the Sixth Circuit erroneously decided below that he was not entitled to absolute immunity in his position as a member of the Oakland County Concealed Weapons Licensing Board is that the Sixth Circuit erroneously assumed that said Board was not covered by the provisions of the Michigan Administrative Procedures Act. Cf.-Hanselman v Wayne County Weapon Board, 419 Mich. 168 (1984). Petitioner Case points out that under the aegis of Hanselman v Killeen, 112 Mich F275 (1982), Respondent Lawrence Joseph in fact appealed the restriction of his general concealed weapons permit pursuant to said Michigan APA (MCL 28.426). Please see App. C of the Petition herein.

Respondent Joseph admits that he did utilize the Michigan APA to twice appeal the wrongful acts committed by Petitioner Case at the direction of Petitioner Thompson in restricting Joseph's concealed weapons permit. However, Respondent Joseph contends that the entire record of Joseph v Oakland County Concealed Weapons Licensing Board, Oakland County Civil Action 82-247153 AA (Mich) will reveal that your Respondent had to contend with procedures which were substantially out of conformity with said Michigan APA. There was no record kept, no reasons given and no adversarial process involved in the original restriction of Joseph's permit. A voluntary remand from the state circuit court to the Board was had wherein the licensing hearing was repeated. Although Joseph presented a facially valid case for an unrestricted permit, it was still denied without reasons being entered on the record.

During the subsequent administrative appeal, counsel for the Concealed Weapons Licensing Board indicated that the change in Respondent Joseph's license occurred as a result of a change in the standards by which licenses are granted by the Board. However, it was admitted that there was no written change in policy and no notice given of any such change.

Petitioner Joseph had to seek the extraordinary relief of being allowed to take the deposition of a Board member within the course of an administrative appeal, and to further be allowed to inspect the entire records of the Concealed Weapons Licensing Board for a three year period, in order to disprove the false contention in the administrative appeal that the Board had somehow "changed its standards." It was only after this arduous and extraordinary process that it was conclusively proven that the change in Respondent Jo-

seph's license had been brought about solely at the insistence of Petitioner Case, acting on the directions of Petitioner Thompson. The conspiracy between Thompson and Case took place outside of and in advance of the actual administrative licensing review itself.

Respondent Joseph contends that there are no comparable administrative actions or appeals within Michigan jurisprudence. The wrongful action of Petitioner Case in compromising his lawful duty to fairly treat those who appeared before him in his administrative capacity was imposed upon Petitioner Case as a condition of his employment by Petitioner Thompson. None of the usual administrative procedures and safeguards applied. Petitioners Case and Thompson's actions can in no fashion be characterized as quasi-judicial in this instance.

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In addtion, Respondent Joseph points out that the subsequent Michigan Supreme Court decision in Hanselman v Wayne County Weapon Board, supra eliminates even the protections under the Michigan APA which were accorded to him in his concealed weapons license case. The opinion below was entirely correct in withholding absolute immunity from Petitioner Case as a member of the Board.

On a broader policy level, this Court's decision in Cleavinger v Saxner, 106 S Ct 496 (1985) militates against extending absolute immunity to the members of state and local licensing boards. These bodies have different functions than those of administrative review boards or the administrative law judges who decide matters of administrative prosecution or other adverse action. The Court reviewed in Cleavinger, id. at pages 500 and 501, the governmental officials to whom quasi-

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judicial or absolute immunity has been extended. Nowhere has it been extended to the members of state or local boards which carry out regulatory or licensing functions. Indeed, Cleavinger reemphasizes the "rare and exceptional character of absolute immunity."Id. at 501.

The leading case in this area is Butz v Economou, 438 US 478, 98 S Ct. 2894 (1978). Cleavinger summarizes the Butz factors for determining the propriety of absolute immunity for officials who carry out adjudicative public functions. Those factors are:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal." Cleavinger, supra at 501.

In analysing the functioning of a county concealed weapons licensing board in Mich-

igan against the above standards, it is clear that the businessmen and other eligible citizens who might need concealed weapons are unlikely to attempt to harrass or intimidate the members of such boards. At present in Michigan there are no safeguards that reduce the need for private damage actions as a means of controlling unconstitutional conduct. There is no indication that concealed weapons board members need to be insulated from political influence. Indeed, the membership of such boards is rotated, with representatives from the Michigan State Police, the county prosecutor's office and the county sherrif's office filling the three permanent spots at the will and direction of their individual agencies.

Precedent has little importance in these matters inasmuch as there is no recorded body of decisions before such boards collected on either a local or statewide ba-

sis. The process is nonadversarial inasmuch as the board is never represented by counsel in its everyday proceedings and the individual applicants are rarely represented.

The possibility of correctability on appeal of wrongful decisions by said boards now exists only in the form of common law or equitable writs, attempting to overcome the strong presumption of validity and administrative regularity.

Consequently, under the Butz and Cleavinger standards, Petitioners have little basis on which to claim that the Sixth Circuit erred in refusing to accord Petitioner Case absolute immunity for his bad faith and unconstitutional actions regarding Respondent Joseph.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Petition for a Writ of Certiorari be denied.

Respectfully Submitted,
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/s/

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